207 - 28864

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| BEE T. DEMPSEY, et al, Appellees, v. ALBERT C. THUNER, Appellant. | 236 I.A. 619 APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

Opinion filed Oct. 30, 1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This was an action in forcible detainer. The plaintiffs put in evidence a written lease; an assignment of it to the plaintiffs; testimony that the plaintiffs owned the premises at the time of the trial, and that the term of the defendant had expired before suit.

It is now claimed, in an endeavor to reverse a judgment of the trial judge based on a directed verdict for the plaintiff, that there was error in permitting each of the plaintiffs to testify that they, together, owned the property in question.

There are two reasons, however, why this court ought not to allow that claim. In the first place, the case was tried by the defendant only on the theory that he had complied with the requirement of the lease as to giving the lessor notice of extension, and in the second place, there was sufficient evidence introduced on the subject of the plaintiffs' ownership.

ROY - 3882A

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| MRS I. GERSHEY, et al, Appellees, v. ASBURY D. THORSEN, Appellant. | 236 I.A. 619 APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

Opinion filed Oct. 30, 1926.

MR. JUSTICE BARTON delivered the opinion of the court.

This was an action in forcible detainer. The plaintiffs put in evidence a written lease; an assignment of it to the plaintiffs; testimony that the plaintiffs owned the premises at the time of the trial, and that the term of the defendant had expired before suit.

It is now claimed, in an endeavor to reverse a judgment of the trial judge based on a directed verdict for the plaintiff, that there was error in permitting each of the plaintiffs to testify that they, respectively, owned the property in question.

There are two reasons, however, why this court ought not to alter that claim. In the first place, the case was tried by the defendant only on the theory that he had complied with the requirement of the lease as to giving the lessor notice of extension, and in the second place, there was sufficient evidence introduced on the subject of the plaintiffs' ownership.

It is admitted that the lease was for two years, expiring on April 30, 1923, unless it was extended. The lease contained the following clause,

> "Party of the second part is to have privilege of extending this lease at a rental to be decided on by party of the first part at end of this term, notice of intention to extend or wish to extend must be given by party of the second part to party of the first part in writing sixty days before April 30, 1923."

The evidence showed that the property had been sold by the owner in March, 1923, while the lease was still running, and at the trial, the plaintiffs offered in evidence the deed purporting to convey the property to them. It was at first received in evidence, but, upon the trial judge, in the course of cross-examination, stating that he did not see why it was put in evidence, counsel for the defendant moved to strike it out as "immaterial," and that motion was allowed. Of course, that claim of the defendant at the trial, that is, immateriality, is entirely inconsistent with the claim now made, which is, that it, the deed, was not only material, but of the very essence of the plaintiffs' case. It was material and should not have been stricken out, for the simple reason that without proof that the term was ended and that the plaintiffs had succeededto the right to possession as new owners, they would have no right to sue. However, having been stricken out at the instigation of counsel for the defendant, it is not now his privilege to claim that its absence is error; his conduct constitutes an estoppel. Further, on the face of the record, we think that there was sufficient competent evidence that the plaintiffs owned the property, and, so,

It is admitted that the lease was for two years, expiring on April 30, 1933, before it was extended. The lease contained the following clause,

> "Party of the second part is to have privilege of extending this lease as a rental, to be decided on by party of the first part at end of this term. Rights of interests to extend or wish to extend must be given by party of the second part to party of the first part in writing, three months prior to April 30, 1933."

The evidence showed that the property had been sold by the owner in March, 1933, while the lease was still running, and at the trial, the plaintiffs offered in evidence the deed purporting to convey the property to them. It was at first received in evidence, but, upon the trial judge, in the course of cross-examination, stating that he did not see why it was put in evidence, counsel for the defendant moved to strike it out as "immaterial," and that motion was allowed. Of course, that claim of the defendant in the trial, that is, immateriality, is entirely inconsistent with the claim now made, which is, that as the deed, was not only material, but of the very essence of the plaintiffs' case. It was material and should not have been stricken out, for the simple reason that without proof that the lease was sold and that the plaintiffs had succeeded to the rights to possession on the owner, they would have no right to sue. However, having been stricken out by the instruction of counsel for the defendant, it is not now his privilege to claim that his absence is error; his conduct constitutes an estoppel. Further, on the face of the record, we think that there was sufficient evidence that the plaintiffs owned the property, and, so,

were entitled to possession, even though the term of the original lease had expired.

When the plaintiff Dempsey was asked if he knew who the owner of the property was at the time suit was brought, it was objected to, but no reason was given, and the witness stated that it was owned by Dempsey and Way. And a similar question was propounded to the plaintiff Way, as of the time of the trial, and a similar objection and answer made. Such evidence, there being nothing to the contrary, was sufficient, and the objections, giving no reasons, were futile, and the answers properly allowed to stand.

There being no error in the record, the judgment is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

28899

241 - 28899

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| ALEXANDER EISENSTEIN, et al, Appellees, v. CHARLES BOSTROM, Commissioner of Buildings of the City of Chicago, Appellant. | 236 I.A. 619<br>APPEAL FROM SUPERIOR COURT, COOK COUNTY. |

Opinion filed Oct. 30, 1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from an order authorizing the issuance of a writ of mandamus against the defendant to compel him to issue to the petitioners a building permit. The same cause was here once before. Eisenstein v. Bostrom, 226 Ill. App. 644. This court there reversed a judgment for the petitioners. That was done on theground that the petition was defective and subject to demurrer. Since then the petition has been amended; and, upon a general and special demurrer, the trial judge again ordered the writ to issue.

The question now arises, whether the petition as amended makes out a case. We think it does. It is not necessary to recite in detail the contents of the amended petition, especially as the general subject-matter is set forth in the former opinion of this court. It is urged for the respondent that the petition is defective in that it fails to allege that the petitioners filed an indemnifying bond and fails to allege that they had complied with the

water to be used in the future.

Section 234 of the ordinance provides as follows:

> "Before the Commissioner of Buildings issues a permit as aforesaid, he shall require evidence from the applicant that payment has been made to the Bureau of Water of the City for the water to be used, or for a water meter for measuring all the water to be used in the construction of such building, under the regulations of the Bureau of Water. Such applicant shall produce evidence that he has filed with and had approved by the Commissioner of Public Works of the City an indemnifying bond protecting the city against any and all damage that may arise to the streets or alleys upon which such building abuts, and to the city, and to any person in consequence or by reason of any obstruction or occupation of any street or sidewalk in and about said operations."

The petition, as amended, is very elaborate, and sets up the various steps taken by the petitioners in their unavailing endeavor to obtain a building permit. As to the indemnifying bond, it alleges that they tendered one in the penal sum of $10,000.00 to the Commissioner of Public Works; that it provided for the protection of the City of Chicago "against any and all damage that might arise to the streets * * * and to the City and to any person * * * by reason of the proposed operations; that said Commissioner of Public Works declined to accept such bond and stated that the same was unnecessary," for the reason that Sheridan Road upon which the property abutted was under the jurisdiction of the Lincoln Park Commissioners; that on November 25, 1921, they applied to the respondent for a building permit; that he received an inspected certain blue-prints, drawings, survey, permits, receipts and application, and accepted and received them as sufficient; that they, the petitioners at the time of presenting those documents, informed him of the action of

the Commissioner of Public Works as to the bond which was tendered to him and which he refused on the ground that it was unnecessary; that they then tendered to respondent, the Commissioner of Buildings, an indemnifying bond, such as is above described, and it was refused by the respondent.

As to the payment for water to be used in the future, it is alleged that they presented certain of the documents, above referred to, to the Bureau of Water, and offered to pay the legal fee, and requested the issuance of a water permit and the installation of a water meter, but were told to include the application for a water permit in their application for a building permit, and that a water meter would be installed and permission given for the use of water upon the issuance of the building permit by the respondent; that that was the customary way of disposing of such applications and permits; that, at the time of presenting to the respondent the various documents above referred to, the petitioners informed the respondent of the action of the Bureau of Water, and that the respondent then advised them "that their application for building permit and use of water was in proper form, and that such was the usual course of business in said Bureau of Water and in the Department of Buildings."

From the foregoing, it will be seen that it is alleged that the petitioners did all that reasonably could be expected of them in their endeavor to comply with the ordinance and yet were refused a permit. The respondent's demurrer practically admits that the bond was in proper form and was tendered, and without substantial reason, refused.

Counsel for the respondent have cited Burton Co. v. City of Chicago, 336 Ill. 383. In that case a bill was filed against the City of Chicago to enjoin it from interfering with the work of building a vault under an alley, under a permit issued by the Commissioner of Public Works, although the ordinance involved provided that the permit should be issued by the City Council. The Court in that case said,

> "The agent of a municipal corporation can no more bind the corporation in its private corporate capacity beyond the authority conferred upon him than an agent of an individual can bind his principal beyond his authority. The mere issue of the permit gave no right to appellee, because the commissioner of public works was without authority to issue it."

That is the converse of the instant case. There he purported to give that which he had no authority to issue, whereas here, he refused that which the law commanded him to give. Here the petitioners proffered substantially full compliance with the law and it was rejected. That should give them a clear right to the writ. The declination of the Commissioner of Public Works, and then that of the respondent, brought about an impasse.

It does not follow, because there may have been a difference of opinion between the two commissioners - whether sincere or otherwise - that the petitioners should suffer. Considering the situation that is disclosed by the contents of the petition, the argument for the respondent, both as to the bond and the water, is too fine, and, if recognized as meritorious, would tend to make it too difficult to deal with a municipality.

Counsel for the respondent, also, cite Wise v. City of Chicago, 183 Ill. App. 215. In that case, although an ordinance was involved which provided that a certain kind of structure could not be put up unless certain frontage consents were first obtained, the building commissioner issued a permit and some work was done thereunder. This court there said:

> "If t * * the appellee was not entitled to a permit to build his garage at the point proposed without consents, the commissioner of buildings was wholly without authority and power to grant him such a permit. The doctrine of estoppel does not apply where a city official has exceeded his authority in issuing a permit in violation of a city ordinance."

That does not mean, however, that mandamus will not lie where a city official has done less than he was bound to do. It is not alleged that the respondent affirmatively undertook to grant something beyond his legal scope, as was the case in most of the cases cited in support of the demurrers. Wise v. City of Chicago, (supra); Seeger v. Muller, 133 Ill. 88; Burton Co. v. City of Chicago, (supra) The claim of the petitioners is that the respondent refused to do his duty and that the allegations of their petition set up sufficient facts to show a clear right to the writ. Upon a careful analysis of the petition as amended, we are of the opinion that it is amply sufficient to justify the order of the trial judge. The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

285 - 28913

DIAMOND CAB CO., a corp.,
Appellee,

v.

A. C. HENDRICKS,
Appellant.

236 I.A. 619

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct.30, 1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The common law record in this case shows that the plaintiff, Diamond Cab Co., filed a statement of claim alleging that a taxi-cab belonging to it was run into by an automobile belonging to the defendant and through the defendant's negligence the plaintiff's taxi-cab was damaged; that a summons was issued; that the defendant filed his appearance; that an order was entered after the expiration of the ten days, defaulting the defendant for failure to file an affidavit of merits; that on motion of the plaintiff, a jury was called to assess the plaintiff's damages; that its damages were assessed at the sum of $179.95; that a verdict, in tort, in the sum of $179.95 was rendered, the defendant not being present; and that judgment was entered upon the verdict. The bill of exceptions shows that on July 27, 1923, more than thirty days after the judgment, the defendant filed an affidavit and moved that the judgment be set aside and he be allowed to defend. The affidavit sets up that on March 10, 1923, he appeared in response to the summons; that when he appear-

ed on the return day he believed that all he was required to do was to file his appearance and learn the date of the trial according to the printed information contained in the summons:

> "that when said above case was called on said return day, defendant, in response thereto, stepped to the bar of said court and told the court that he desired a jury trial; whereupon the court then directed this defendant to the clerk in said court; that said clerk then handed defendant a printed appearance and requested defendant to sign same; that defendant did sign said appearance; whereupon said clerk directed this defendant to take said appearance into the clerk's office and pay the fee required by law for a jury; that defendant, in obedience to said direction, took said appearance in to the clerk's office and paid the jury fee required by law; that then defendant returned immediately to the court room where summons was returnable, and handed said appearance to the clerk there, showing said jury fee as paid; that said clerk then wrote upon said appearance that jury was demanded, and then told this defendant that his case was to be placed upon the next jury calendar of this court, to be called in due course for trial, and that defendant must watch said jury calendar for the day upon which his cause would becalled for trial; and thereupon defendant left the court room, believing, and relying upon such belief, that he had done all that was required of him by law to defend the suit, and that all he was further required to do was to watch the call of said jury calendar;
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> That he made no motion for time to file an affidavit of merits; that he knew nothing about an affidavit of merits or that same was required, and that the clerk in said court said nothing to him about filing an affidavit of merits; that he believed and relied solely upon the clerk's information that all he was further required to do was to watch the call of said jury calendar;
>
> That he has a good defense to said suit upon the merits; that the accident mentioned in these proceedings was caused by plaintiff's negligence and no contributory negligence on his part; that his first knowledge of the judgment herein was when execution was served upon him on June 13, 1933."

Upon that affidavit the court overruled the motion to vacate the judgment, and this appeal was then taken.

The motion was in lieu of the common law writ of error _coram nobis_ (Sec. 88, Chap. 110 of the Statutes), and the

question arises whether the trial judge erred in considering the situation one in which the motion ought not to be allowed. We do not think he did. When one brings a civil suit and a summons is issued and served, it is not the duty of the clerk of the court to give the defendant full instructions as to his obligations, and inform him concerning the apt rules of procedure; obviously that would be impracticable.

In Conrad v. Gamhouse, 230 Ill. App. 598, this court said:

> "A motion to set aside a judgment after the term, is one of very serious import. If treated lightly, it threatens the stability of the courts. As a basis for such a motion, the statute prescribes fraud, accident or mistake. Here, illness, the result of cancer, the impairment of her memory, and general physical and mental disability, do not seem to come within any reasonable connotation of the words of the statute. * * * The fact that she was ill, would be pertinent on a motion for a continuance while the cause was lis pendens. After trial and judgment, however, it is irrelevant. It may be a very persuasive plea for indulgence, but it has no legal import as to justify setting aside a judgment under sec. 88."

The same may be said, mutatis mutandis, where, as here, ignorance is alleged.

It is urged that as the printed matter on the summons gave the defendant some information, but did not inform him as to the rule requiring an affidavit of merits, and as he was ignorant of the rule, that his failure to file an affidavit of merits was an excusable mistake. That, however, is not the law. After the thirty days, the judgment becomes fixed, save as to a few exceptions; and a failure merely through ignorance, to file an affidavit of merits is not one of them. Counsel

for the defendant has cited Tonsetti Brewing Co. v. Koehler, 200 Ill. 380, and Fisa v. Bezak, 206 Ill. 344, but they do not support the contention made for him; they are, if anything, the other way.

The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

28734

356 - 22234

BRUNO KOWALSKI, a minor by ANTON KOWALSKI, his next friend,

Appellant,

v.

FRANK M. BLOCK, as BLOCK ELECTRIC CO.,

Appellee.

236 I.A. 620

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct.30, 1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

About 5:30 P.M., on August 18, 1921, the plaintiff, Bruno Kowalski, a young man nearly sixteen years of age, jumped off a street car going west on Grand avenue, while it was in motion, and crossed over to the south and west behind that car, intending to go to the southwest corner of the intersection of Grand avenue and Mango street, but, seeing another street car coming toward him from the west on Grand avenue, he changed his direction, and went towards the northwest corner of the street intersection, and, while doing so, was struck by the defendant's truck.

On January 3, 1922, Anton Kowalski, as his next friend, brought suit against the defendant, Frank M. Block, as the Block Electric Company, claiming that the truck of the defendant was driven so negligently that the plaintiff, while in the exercise of due care, was severely injured. There was a trial before the court, with a jury, and a verdict and judgment that the defendant was not guilty. This appeal is therefrom.

At the trial, three occurrence witnesses were called by the plaintiff. The evidence of the plaintiff, Bruno Kowalski,

is substantially as follows: that, at the time in question, he was fifteen years old, in good health, and was working as a press boy for the Meyercord Printing Co. at $14.00 a week; that on August 18, 1921, he got on a street car at Cicero and Grand avenue, going west, and got off the street car at the northeast corner of Grand avenue and Mango street; that the street car went west on Grand avenue, after leaving Cicero avenue; that as "I crossed over to get to my side of the sidewalk (meaning, southwest), another car was going east, and I had to back up, and as I backed up an automobile came along and hit me;" that the automobile was coming from the east and going west; that when he got off the Grand avenue street car, he saw the automobile "a block in back of me, so I thought he would come around and slow down, and he did not slow down, so when I backed to the northwest corner of Grand and Mango, he hit me;" that the automobile was going about 20 or 25 miles an hour; that when it struck him he was about two feet away from the curb, at the northwest corner of Grand avenue and Mango street; that Grand avenue runs east and west; that after he got hit, he tried to get up, but was unable to do so. He further testified that he was taken to a hospital and operated on, and remained in the hospital for two weeks; that after he was taken from the hospital to his home, he was again taken to the hospital, where he remained for another week; that from August 18, 1921 to February 18, 1922, he was on crutches all the time; that he wore a cast over his left leg until February 18, 1922. On cross-examination, he testified that he got off the car at the northeast corner while it was in motion, and that it was then going about four miles an

hour; that he stood on the step and looked behind to see if anybody was coming before he jumped off; that there was a Ford truck about a block behind him when he got off the car; that the truck had stopped at Major street, one block east from Mango street; that after he got off the car he went about three steps west, and then ran southwest to get to his home; that when he got over to the east bound street car track, he saw a street car coming from the west going east; that then he had to "back up;" that at that time he was about five feet from the street car going east; that he then walked over to the northwest corner; that the distance from where he was to the northwest curbing was about thirty feet; that he was about in the tracks of the east bound street car when he first saw the east bound car; that when he saw it he did not run, he walked; that when he got off the street car, he first saw the automobile which struck him, at the northeast corner of Major street and Grand avenue; that when he next saw it, it was when it struck him. When asked if he would have been hit if he had stood in the middle of the west bound track, he answered that he did not know; that he was hit about two feet away from the curb, at the northwest corner; that he thinks it was the left front wheel of the automobile that struck him.

The evidence of one Vortabedian is that on August 18, 1921, when he was on the northwest corner of Mango street and Grand avenue, he saw "the plaintiff jump off of the car and try to pass on the other side of Grand avenue, that an east bound car was coming, and he couldn't go there, so he turned back north to get on the corner, and during that time I seen him he got hurt, got hit by an automobile or truck;" that he first saw the truck just before it passed in front of the drug store,

about fifteen or twenty feet from where it was when it struck the plaintiff; that he could not tell how fast it was going; that it was the left side of the automobile that struck the plaintiff; that after it struck him, the truck turned into Mango street, and stopped at the corner. On cross-examination, he testified that the car did not stop at Mango and Grand avenue, and was going west when the plaintiff jumped off; that after he jumped off, he went a few steps, and ran and tried to cross Grand avenue south, but seeing the east bound car coming too close, he turned towards the corner and ran back.

The witness Tarpinian testified that he was standing on the drug store corner with his cousin, Vortabedian (the witness whose testimony has just been recited), and saw the plaintiff get off a street car which was going west; that there was another street car coming east; that as the plaintiff was crossing to the southwest corner, he had to "come back again, and there was a truck going west, and he came and hit him;" that the first time he saw the truck was when it hit the plaintiff; that he did not know whether it was going fast or slow. On cross-examination, he testified that he was standing on the corner near which the plaintiff was struck, the northwest corner, and that the plaintiff ran toward the southwest; that there was a street car coming, and he ran back again, running then to the northwest corner; that the automobile, when he first saw it, was about twelve feet away; that the plaintiff was in the middle of the street.

One Gassin, an electrician for the Block Electric Company, who was driving the truck at the time in question,

testified that he was driving west on Grand avenue; that the truck was in the middle of the preceding block, and the car stopped at Major street, and that at that time he saw the plaintiff on the steps of the car; that at the time the plaintiff jumped off the street car, the truck was about thirty-five feet behind him; was straddling the outside street car rail; that the plaintiff "jumped off the car, ran a few steps west, ran directly south, back of the car, in front of an east bound car;" that he ran south and a little west, back of the car from which he had jumped, and in front of an east bound car; that "He stopped all of a sudden and came back towards me;" that when he was on the step, before he jumped and when the truck was about thirty-five feet back of him, he looked and saw the truck that the witness was driving; that when the plaintiff stopped on seeing the east bound street car coming, the truck was about twelve feet away from him; that "He started running in the direction going north, and turned around and ran in front of me;" that he, the witness, "pulled over" to the right as close to the curb as he could at Mango street. When asked on what part of the intersection was he struck, the witness answered, "About the center line." He further testified that the truck went about four feet after it struck the plaintiff, and immediately preceding the time of the collision, the truck was going about ten miles an hour. On cross-examination, he testified that Grand avenue, at that point, is about thirty feet wide, and Mango avenue twenty-six to twenty-eight feet; that it was a Ford truck that he was driving; that when such a truck is going at the rate of ten miles an hour, it may be stopped within

three or four feet; that after the plaintiff started to go back to the west bound track from the east bound track, the plaintiff was about twelve feet ahead of him and was running north.

The evidence of the doctor who attended the plaintiff was that the right leg was broken right across at the lower thigh.

The jury having found for the defendant, it is now urged that the verdict is against the manifest weight of the evidence. No brief has been filed for the defendant. The situation of fact was one particularly appropriate for the judgment of the jury. The plaintiff, a young man, nearly sixteen years of age, jumped off a west bound street car while it was in motion, crossed over to the south and west behind that car, and seeing another street car coming towards him from the west, turned back, and while going towards the northwest corner of the street intersection, was struck by the defendant's truck. It is a reasonable inference from the plaintiff's testimony that he had put himself in a somewhat dangerous predicament. He was somewhat close to the center of the street intersection, with a west bound car ahead of him to the west, which necessarily blocked his view west along the east bound track. Obviously, when he passed behind the west bound street car, he was surprised to find another car coming from the west and close upon him. Owing to the danger which he had voluntarily precipitated, he had to act quickly. Accordingly, he changed his direction, and went to the northwest. It may be that the jury concluded that he then got in front of

the truck, and although struck by the truck, it was not the fault of the driver. The evidence as to the speed of the truck, and as to the distance of the truck from the plaintiff just prior to the collision, and the space within which the truck could be stopped, were all matters properly for the consideration of the jury. And, now, with only the record before us, we do not feel that it is reasonable to say that the verdict is manifestly against the weight of the evidence.

Counsel for the plaintiff claim that the court erred in giving certain instructions. One of the instructions which was criticised is that numbered 8. It is as follows:

> "You are instructed as a matter of law that a person who is riding on a street car, and who gets on the step thereof while the street car is in motion, for the purpose of alighting therefrom, is required by law to use ordinary care, caution and prudence not to put himself in a position of risk or danger by so doing, and if by so doing he does put himself in a position of risk and danger, then the law requires him to exercise a degree of care for his own safety in keeping with such risk or danger."

There may be some question whether the act of jumping off the street car while it was in motion in any way proximately contributed to the accident; but that instruction, at the most, states that if by jumping off the street car he put himself in a position of risk and danger, then the law requires him to exercise a degree of care for his own safety, in keeping with such risk or danger; it did not require of him any more than would have been required of him under any other circumstances, no more than if he had gotten off a street car while it was standing still.

It is also contended that the instructions numbered 1, 3, 5 and 6, which were given for the defendant, were objectionable. The objection was that it was not pointed out, in any of them, that the plaintiff was a minor, and liable only for the degree of care required of persons of his age and capacity. It is true that none of the instructions refers to the minority of the plaintiff.

In Harntnett v. Boston Store, 265 Ill. 331, the court said: "A minor may reasonably be expected to exercise that degree of care which a person of his age, intelligence, capacity, discretion and experience would naturally and ordinarily use."

In McGuire v. Guthmann Transfer Co., 234 Ill.125, the court said: "In the absence of proof to the contrary, appellee (the child who was injured) must be presumed to have such capacity to appreciate danger and such discretion and intelligence in protecting himself therefrom, as might reasonably be expected of an average child of his age, and under like circumstances." In the instant case there is no evidence in regard to the capacity of the plaintiff, so that it was proper to assume that he did possess a capacity that might reasonably be expected of the average boy of his age. Bearing that in mind, the instructions in question, which refer to "ordinary care," "ordinary prudence," and "degree of care . . . as a reasonably prudent person in the exercise of due care would use," are entirely proper, inasmuch as, in reality, they merely told the jury that the plaintiff was bound to exercise that degree of care which an average prudent person of his age would exercise.

There is some criticism of the action of the trial judge in modifying instruction No. 7. That, however, we think is insubstantial.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

286 - 28944

MAX S. GRIFFENHAGEN,
Appellee,

v.

WARREN B. IRONS,
Appellant.

236 I.A. 620

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct.30,1924

MR. JUSTICE TAYLOR delivered the opinion of the court.

On September 23, 1920, the plaintiff leased in writing an apartment at 855 West End avenue, New York City, to the defendant. The term began October 1, 1920 and ended September 30, 1923, and was for an annual rental of $2500.00, payable $208.34 monthly in advance. The lease recited that the lessee had deposited with the lessor the sum of $416.66, as security for the faithful performance of the terms of the lease, and that, upon such performance, the landlord agreed to return to the tenant, one day after the expiration of the term, the said sum, together with six per cent interest. The lease, also, recited that if the premises should become vacant prior to the expiration of the lease, the lessor might take possession and relet them and apply the rents received therefor upon the rental accruing under the lease, and that the tenant should be liable for any deficiency. It is not disputed that the defendant occupied the premises, being an apartment in a 24 apartment building, until some time in February, 1921, when he moved out, and that he paid the rent up to March 1, 1921, and paid nothing more. The plaintiff

brought two suits in the Municipal Court of Chicago, one for the rent for March, April, May and June, 1921, and one for rent for July, August and September, 1921. The two suits were consolidated, but for hearing only. In the former, a judgment, upon a directed verdict, was entered in favor of the plaintiff in the sum of $833.36, and in the latter in the sum of $625.02. This appeal is from the latter judgment.

It is urged for the defendant that the evidence shows that the defendant surrendered the premises as of March 1, 1921, and that they were accepted by the plaintiff, also, that the defendant produced a sub-tenant ready, able and willing to assume the lease.

On the trial of the case, counsel for the plaintiff took the position that the defendant was not entitled to show that the lease in question was abrogated and surrendered as the result of an oral arrangement made between him and his landlord. That was wrong. In Alschuler v. Schiff, 164 Ill. 298, the court said: "We know of no good reason why he (a lessee) may not, also, show by parol proof that, by agreement between the landlord and himself, he had been released from the terms and obligations of the lease, and has, in pursuance thereof, surrendered possession of the premises to the landlord." Baker v. Pratt, 15 Ill. 568; White v. Walker, 31 Ill. 422; Landendorf v. Ritter, 225 Ill. App. 466.

At the outset, when the defendant was on the stand, and he was asked on direct examination, as to a conversation he said he had with the plaintiff prior to leaving the premises,

upon objection being made by counsel for the plaintiff, the trial judge said, "You cannot cancel a lease in that way;" and when the witness was further asked if he knew that any of the tenants he had offered to the plaintiff, had rented any of the apartments in the building, an objection was made, and sustained by the court. Likewise, when asked what the superintendent said, if anything, in the presence of the plaintiff when the defendant moved out, an objection was made and sustained. And when asked, referring to some prospective tenant the defendant apparently had sent to the plaintiff, "Did the tenant move into that building?" an objection was made and sustained, and the answer "Yes", stricken from the record. When asked, "Will you state whether or not the tenant who moved into the premises was the same one that you showed the premises to, or the same one that you offered as a tenant to Mr. Griffenhagen?" an objection was made and sustained. When asked, "Do you know whether or not the premises are now occupied?" an objection was made and sustained. It is true that the defendant was allowed some scope, and did put in some evidence in support of his contention; but an examination of the record leads us to the conclusion that, considering the law, and the rights of the defendant thereunder, it cannot reasonably be said, in view of the objections made on the plaintiff's behalf, and sustained by the court, that there was what the law contemplates as a fair trial. Evidence of matters in parol, that tended to show a surrender and acceptance, or that tended to show the production of a tenant ready, able and willing, should have been admitted.

The judgment will be reversed and the cause remanded for a new trial. REVERSED AND REMANDED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

336 - 28304

MAX S. GRIFFENHAGEN,

Appellee,

v.

WARREN B. IRONS,

Appellant.

230 I.A. 620

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Oct. 30, 1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This appeal is determined by the opinion handed down, this day, in Max S. Griffenhagen v. Warren B. Irons, General No. 28344.

The judgment, therefore, will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'CONNOR, P. J. AND THOMSON, J. CONCUR.

28978

330 - 28978

| | | |
|---|---|---|
| EMMA JULIA KERNAN, Appellee, v. THOMAS KERNAN, Appellant. | ) | 236 I.A. 620 APPEAL FROM SUPERIOR COURT, COOK COUNTY. |

Opinion filed Oct. 30, 1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The complainant and defendant were married on October 25, 1895, and lived together amicably until May 6, 1918. They had no children. On May 24, 1921, the complainant filed a bill for divorce, alleging that her husband, the defendant, had deserted her on May 6, 1918. In the course of the litigation, various pleadings were filed, including a cross-bill by the defendant. The defendant in that pleading charged his wife with desertion as of May 6, 1919.

At the trial before the Chancellor considerable testimony was introduced to show what transpired on and about May 6, 1918, in regard to their separation. Also, evidence was put in which showed that at that time the title to certain real estate, consisting of three houses and lots, stood in the name of the wife, and that a paid up policy of insurance on his life, in the sum of $5,000.00 which the husband had taken out in 1897, and on which he had paid all the premiums and which was payable to her, without reservation of the

right to change the beneficiary, was in her possession.

The decree, which was entered on March 21, 1923, found that the husband was guilty of desertion; that the legal title to the real estate was in the wife, and that it was purchased and paid for with her money, but, that the policy of insurance, in equity and good conscience, belonged to him. The decree orders her to deliver, by proper assignments, the policy to him, and then recites that pursuant to the order of the court "said policy is hereby assigned, transferred and delivered to Thomas Kernan in open court in full compliance as heretofore and herein directed." It then orders that the title to the real estate be confirmed in her, free of dower and homestead and "in lieu of and release of all right to alimony." It then orders that he pay her $75.00 for solicitor's fees; and pay the costs of the suit. This appeal was taken from that decree; and upon being taken the court ordered the husband to pay her $300.00 for solicitor's fees, and $50.00 for expense money in the Appellate Court. No brief has been filed here for the complainant.

It is urged for the defendant (1) that it was not shown by a preponderance of the evidence that he was guilty of willful desertion, without reasonable cause, and (2) that he is entitled to a half interest in the real estate.

1. On the subject of desertion, counsel cite Chatterton v. Chatterton, 231 Ill. 449. In that case the evidence merely showed that they, husband and wife, had not lived together for two years, and the Court there said,

"There is nothing in this testimony to show for what reason or with what intention her husband left her. In other words, there is no proof that the desertion was willful or that it was without any reasonable cause, as required by the statute," and, at the close of the opinion, it is stated that this court "correctly decided, as a matter of law" that there was no such proof. In the instant case, however, there is the evidence of the wife that on Labor Day 1918 she begged and pleaded with him to come and stay at the rooms to which they had moved their household goods, but that he refused and she did not see him again till at the trial. We have examined all the evidence, and feel that it would not be reasonable to override the judgment of the Chancellor. Evidently he believed the wife, and we do not find enough in the record to challenge the justice of that conviction.

(2) As to the real estate, the evidence in the record does not show, with sufficient clearness, just what, if any, money the defendant supplied in its purchase and repair.

The Chancellor, at the close of the trial, used the following language:

> "The complainant is entitled to a divorce. I will give her all the real estate and if she turns over the policy at the time the decree is entered I will not make any mention of it in the decree. I think that is the better way. She has got the property and I haven't much doubt about it that some little of his earnings went into that property. We cannot get the amount from the record. I am not going to allow any alimony."

The evidence of the complainant is that she took in sewing all her married life; that in 1904 she opened a

candy and periodical store, and fitted it up at a cost of $265.00 which she got from her mother, and that she sold it on May 8, 1918, for $300.00; that she made a little money in the store and it was used to pay for the family necessities; that from 1909 to 1913 she and her husband lived back of the store. It was admitted that the legal title to the property in question was, at the time of the trial, in the complainant, the deed to her being dated November 28, 1913; that it cost $6,500.00 and that she gave back a trust deed for $4,000.00. She further testified that her husband's business was that of gasfitting and plumbing; that he gave her about $5.00 a week; that he did not work regularly; that she saved a little money from sewing and put it in the bank; that she had some income, about $33.00 a month from some property she owned in Detroit, and which she got from her mother; that she received the rents until June 6, 1918, when she sold the property for $3,300.00; that when she purchased the property in question, in 1913, she had $2,750.00 in the bank; that she paid down $150.00, and later, on November 28, 1918, she paid an additional $2,200.00, which she drew from the Illinois Trust & Savings Bank; that she used the $3,300.00 she got from the Detroit property to pay off the mortgage on the property in question; that she incurred, within the three or four years just prior to the trial, an indebtedness of $2,200.00 in making repairs on the property; that the property consists of three six-room houses, in one of which she lives; that she gets a total of $75.00 a month for the rent of the other two; that her husband put the steam-fitting

in the houses. On cross-examination, she testified that the average income from the store for the fourteen years over and above expenses was about $50.00 a month; that during that time her husband worked there sometimes in the evenings and on Sundays; that he opened up the store in the morning; that although her husband put in the steam plants in the three houses, she paid for the fittings; that the money from the store was practically all used for their living expenses.

The testimony of the complainant is contradicted on many points by the defendant. His evidence is to the effect that he helped in paying the expenses and also in paying for and repairing and improving the houses. It would, however, serve no useful purpose here to set forth his testimony in detail. The Chancellor evidently believed the evidence of the complainant, and an examination of the record, does not justify us in holding to the contrary. Giving the paid up policy for $3,000.00 to the defendant, although it was as a contract irrevocably here, was treating the defendant quite equitably, perhaps generously. We are not convinced from the record that the defendant proved that he was entitled to a half interest in the real estate.

In the course of this appeal, there was filed by the appellee (complainant) a plea of release of errors, to which the appellant filed a demurrer, but as no motion was made thereon, we have not considered that issue.

The decree will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

347 - 29005

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| A. F. MELTER, Appellee, v. M. J. O'HERON, Appellant. | 236 I.A. 320 APPEAL FROM MUNICIPAL COURT, OF CHICAGO. |

Opinion filed Oct. 30, 1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Melter, brought suit in the Municipal Court against the defendant, O'Heron, for paving the alley back of the defendant's premises, and obtained a judgment in the sum of $115.65. This appeal is therefrom.

The amended statement of claim recited that the plaintiff's claim was for work, labor and material furnished the defendant at his special instance and request; that the plaintiff's claim was on an implied contract for work, labor and material furnished the defendant by the plaintiff in July, 1923, paving the "rear of 8145 Peoria Street, for $111.00," the interest for ten months at 5% being $4.65, making in all $115.65.

The affidavit of merits recites that the plaintiff did not furnish the defendant labor and material at his special instance and request, and did not pave the rear of 8146 Peoria Street in July, 1923, at the special instance and request of the defendant.

The cause was tried before the court, without a jury.

The evidence of the plaintiff is that in the forepart of June, 1922, he saw the defendant at the latter's home, 8146 Peoria Street, and said to the defendant, "Mr. Quinn told me that you had not signed his petition for the alley paving," that he, further, asked the defendant whether he had signed, and that the defendant said he had not; that the defendant, also, said, when asked why he had not signed it, his reason for not signing was that he did not want his name to appear on the petition; that when he, the plaintiff, then asked, how about paving the alley, the defendant said, "Go ahead with it," if you have a majority of the property owners; that he, the plaintiff, responded, "All right." The plaintiff's evidence, further, is that he graded, paved and rolled the alley, and that while paving it the defendant charged him with breaking his fence and spoiling his lawn; and finally charged him with paving the alley without his consent or signature; that he, the plaintiff, said, "Why didn't you tell me if it was not all right? If you don't want it paved now, say so," that that was all the conversation; that the plaintiff's foreman was present and heard the conversation; that the defendant did not, at any time, while the work was going on, object to the doing of thework. Toward the closing of the plaintiff's direct examination, he was asked if the members of that community, the people living in the two blocks adjoining the alley, signed a petition for him to pave the alley, that is, before the work was begun. Counsel for the defendant objected, on the ground that it was

incompetent, irrelevant and immaterial, but that was overruled, and the plaintiff answered in the affirmative. Upon rebuttal, after the defendant had testified, the plaintiff testified, further, that on June 15, 1922, the defendant, after stating that he did not sign the petition because he did not want his name to appear on it, said, "You go ahead with the paving of the alley," to which he, the plaintiff, answered, "All right."

It will be seen from the foregoing, that the evidence of the plaintiff, if believed, made out a case, especially as it was admitted that the work was done, and it was not denied that the labor and material were of the market value of $111.00. But, it is contended for the defendant that there was neither an express nor an implied contract. With that we cannot agreed. If the defendant said, as the plaintiff testified, go ahead with the paving and the plaintiff did, and finished the work, there was a unilateral contract; a promise by the defendant and performance by the plaintiff; and when the work was done, the contract was executed and the defendant became liable for $111.00. Does the evidence, when it is all considered, fail to make out a case? We do not think it does. It is true that the defendant denied that he told the plaintiff to go ahead with the paving, and testified that he told the plaintiff he did not want the alley paved; in other words, the defendant contradicted the plaintiff. But, that is not here sufficient. Evidently the trial judge believed the plaintiff, and there is in the record, as it appears before us, no such discrepancies as would justify overriding the finding of the trial

judge. Counsel for the defendant objects that it was not shown that the minds of the parties ever met. With that we cannot agree. We think the evidence sufficiently shows, if the plaintiff is believed, an express promise. It is true that the trial judge seemed from his language to base his finding on the fact that "there is not sufficient evidence on behalf of the defendant to show there was not an implied contract." The case is one of the fourth class; and, of course, no question of variance arises and that is particularly true in view of the fact that the phraseology of the statement of claim would really support a judgment based either on an implied or an express contract. Further, the affidavit of merits only denies that the plaintiff paved or furnished the labor and material at the defendant's "special instance and request." That, technically considered, was the only issue.

The judgment will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

28675

43 - 28675

LOUIS COHN,

Appellant,

v.

NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY, a corporation,

Appellee.

23C I.A. 320

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 30, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

On April 14, 1921, the plaintiff, Cohn, brought this action against the defendant Insurance Company, claiming to have suffered a loss to the extent of $1,000, in the robbery of some jewelry which plaintiff alleged was covered by the policy of insurance which the defendant had issued to him. The defendant duly entered its appearance together with a demand for a jury trial and on April 28, 1921, its affidavit of merits was filed, in which, among other things, the defendant alleged that the plaintiff had not suffered the robbery referred to by him in his statement of claim and further that the plaintiff had not complied with the conditions of his policy. A month later the case was placed on the short cause calendar and in September 1921, it was withdrawn from that calendar on plaintiff's motion.

On January 4, 1923, the case was regularly reached for trial on the jury calendar. It went over to January 10, 1923, when the plaintiff put in his proof, nobody appearing on behalf of the defendant, resulting in judgment being entered in favor of the plaintiff in the sum of $1,000. More than thirty

days thereafter, on March 15, 1923, the defendant filed its petition under Section 21 of the Municipal Court Act, seeking to have the judgment of January 10, set aside and vacated and on March 20, 1923, the defendant filed its amended petition, seeking the same relief. In the original petition, the defendant set forth that "through misadventure and accident, petitioner entirely overlooked this case." To the amended petition there was attached the affidavit of a clerk, in the office of defendant's attorney, setting forth that he "had charge of preparing a list of the cases, among which this cause appeared as No. 3462, which case was in charge of Harry Okin, defendant's attorney, and through misadventure and accident said case was left off their list of cases pending in said court and that defendant was not present on either January 4 or 10, 1923."

Defendant's attorney first learned that judgment had been entered, on February 20, 1923, more than thirty days after it had been entered. Failing in his attempt to secure a stipulation for the vacating of the judgment, counsel for the defendant, on March 15 and 20, filed the petition and amended petition, to vacate the judgment. On the latter date, the court, pursuant to the prayer of the amended petition, vacated the judgment of January 10. From the order vacating the judgment, the plaintiff has perfected this appeal.

The plaintiff did not put in issue any of the facts set forth by the defendant in its amended petition but apparently contended in the trial court, and contends here, that the petition, on its face, did not set forth facts sufficient to entitle the defendant to the relief prayed for. In our opinion, the

trial court erred in overruling the plaintiff's contention and in entering the order appealed from. Assuming that the amended petition set forth a meritorious defense, it failed to make a proper showing of diligence. We fail to find any basis whatever in the record for defendant's contention that "to have allowed the judgment to stand on the facts as presented to the court, would have permitted the perpetration of a fraud against the defendant, without the defendant having had an opportunity to present the facts in the case to a court and jury." There was nothing irregular about the entering of the judgment against the defendant. The cause appeared on the regular jury calendar of the court, where it had been placed by reason of defendant's demand for a jury trial, and it was reached for trial in the regular course on that calendar. When so reached, the plaintiff was in court ready for trial but the defendant was neither present nor represented in court, due, by its own admission, to the fact that a clerk in the office of its counsel "through misadventure and accident," left this case off their list of cases pending in the Municipal Court.

No citation of authority is needed in support of the proposition that negligence of counsel is imputed to the client. That failure to appear in court when a case is regularly reached for trial, solely because the case has, by mistake of a clerk, not been included in the list of cases of the office of counsel, pending in that court, does not make out such a showing of diligence as is necessary to support a petition to vacate a judgment, filed pursuant to the provisions of section 21 of the Municipal Court Act in our opinion, is too

clear to admit of argument. It has been so held by this court in Imbrie v. Bear, Illinois Appellate Court, First District, Case No. 28316, Opinion filed June 26, 1923. We find nothing to the contrary in Gumbinsky Bros. Company v. Mullen Bros. Paper Company, 225 Ill. App. 645, which is relied upon by the defendant. In that case, the trial court had vacated a judgment which had been entered in favor of the plaintiff, that judgment having been enteredfor defendant, on account of the failure of the defendant to file an affidavit of defense within the time limited by the court. The defendant had filed its appearance but received no notice on the occasion of the default entered against it. In the course of the opinion filed in that case it is stated that an affidavit of defense and claim of set-off had been prepared by the defendant in apt time to permit their filing within the time allowed, but that "the failure to file them was due to a mistake which must be regarded as excusable under the existing circumstances." What the existing circumstances were is not pointed out. The court does say, in its opinion, that the failure to file the affidavit of defense "was not due to any direct negligence on the part of the appellee or his attorneys." That is not the situation presented in the case at bar.

We feel that we ought to point out that on an examination of the record in this case, the fact is disclosed that when this case was regularly reached for trial in the Municipal Court and, the defendant was neither present nor represented, although demand had been made at the proper time by the defendant for a jury trial, and when the case was taken off the short cause calendar, the court ordered that it be placed in its regular place "on the next jury calendar," a jury was not called to hear the evidence and try the issues, but the case was heard "before

court without a jury." This matter is not referred to in the briefs nor is it before us on this appeal, which involves merely the propriety of the order of the trial court in vacating the judgment after 30 days, on the petition which the defendant filed under Sec. 21 of the Municipal Court Act. We, therefore, do not here pass upon the question referred to.

The order of the Municipal Court appealed from is reversed.

ORDER REVERSED.

O'CONNOR, P.J. and TAYLOR, J. CONCUR.

84 - 28713

DEMETRIOUS G. STAVROPOULOS,

Defendant in Error,

v.

HAROLAMBOS STAVROPOULOS, alias CHARLES STAVROPOULOS,

Plaintiff in Error.

236 I.A. 621

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct. 30, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

It appears from the record that the given name of the plaintiff, in the English language, is James, and that of the defendant is Charles. The plaintiff was a nephew of the defendant and had apparently placed with him for safe keeping, the sum of $300, to represent which, the defendant had given the plaintiff an acknowledgment of his indebtedness for that amount, in writing, under date of July 31, 1918, at Chicago. The plaintiff testified he left to join the army on that date. In September 1921, the plaintiff instituted this action in assumpsit, to recover the $300. The defendant had left Chicago, where he had been in business for many years, in June 1920, and returned to Greece. The plaintiff made an affidavit, to the effect that the defendant was a non-resident, upon which an attachment writ, in aid, was issued. A judgment by default was apparently entered against the defendant on November 8, 1921, and in December, on defendant's motion, this judgment was vacated and the defendant filed a plea of non-assumpsit. In March 1921, on motion of the plaintiff, the defendant's plea of non-assumpsit was stricken and the motion of the defendant for

leave to file an amended plea instanter, was overruled and judgment was entered for the plaintiff. That judgment was reversed on appeal to this court, (228 Ill. App. 629) and the cause was remanded to the Superior Court, where, after a trial before a jury, (the defendant still being absent in Greece and being represented by counsel, and his son appearing and testifying in his behalf) the plaintiff again recovered a judgment for the amount of his claim with interest, in the total sum of $272.50. To reverse that judgment, the defendant has sued out this writ of error.

The plaintiff introduced in evidence the written promise of the defendant to pay him $300, and rested. For the defendant, his son testified that the week before his father left for Greece he heard a conversation between his father and his cousin, the plaintiff, with reference to certain money of the plaintiff, which his father had; that his father asked the plaintiff to bring the note over to his house the following week so that he could settle the matter up as he was leaving for Greece; that the plaintiff said he was unable to find the note, so "they figured it out between themselves as to the amount due the plaintiff, which was $95.00;" that the day before his father left for Greece, the witness drew a check for that amount, on his father's account, and the latter gave it to the plaintiff, in payment of the balance due him. He further testified that after the time the plaintiff had left his money with the defendant, the plaintiff "drew $205.00, leaving a balance of $95.00" and that, at the time he gave a check for this amount there was written on it "the balance due on three hundred dollar note," written by the witness; that after this suit was instituted, the witness procured his father's cancelled checks from the bank and

he then found this notation partially erased. The witness further testified that his father could not sign his name in the English language and he had been writing his father's checks for many years. The check for $95.00 was introduced in evidence. It is drawn on the State Bank of Chicago and is signed "Charles Stavropoulos" and under the signature appear the initials "G.S." The name of the defendant's son is George Stavropoulos. He further testified that his father's personal account was kept in the State Bank of Chicago.

The plaintiff testified in rebuttal that he had a talk with his uncle before he left for Greece and that his uncle told him he was willing to pay him. The plaintiff further testified that the $95.00 check in evidence had been given him by his counsin George "for money I had coming from him * * * for wages;" that when he was working for George the latter had a partner; that he got checks from his partner, which were drawn on the Sheridan Trust & Savings Bank and on the Foreman Brothers Bank; that these checks were signed by George and his partner by the partnership name. He further testified that his uncle, the defendant, left the first part of July, 1920, and "I was given this check about a month afterwards,- about a month after he left." The check for $95.00 was dated June 5, 1920. He later testified, "I got that check in the month of June." and further that he remembered nothing "written down on the check of the balance or something about three hundred dollars;" that he never erased or rubbed out anything on the check,- "I never saw these words on the check."

George Stavoropoulos, the defendant's son, further testified that he had his own bank account in the names of him-

self and his partner; that they dissolved partnership in the latter part of July 1920, and up to that time issued checks in the partnership name; that the plaintiff commenced working for the witness sometime in December 1918; that the witness sold out his interest in the partnership late in July 1920; that he "did business with the Sheridan Trust & Savings Bank, * * * neither I nor my firm ever did business with the State Bank of Chicago." He also testified that before his father left for Greece, the latter sold out his interest in the business in which he had been engaged in Chicago and that he received $15,000 in cash at that time.

In the affidavit of George Staveropoulos, filed in support of defendant's motion to vacate the judgment the plaintiff had recovered, he alleged that the defendant "has been a resident of the City of Chicago for 30 years until the present time and was on the date of the beginning of said suit and is at the present time a resident of the City of Chicago, State of Illinois," and that at the time this suit was begun, the defendant "was temporarily absent from his home in Chicago, on a visit to his place of birth," in Greece. But when the defendant appeared by his counsel and filed his pleading, it was a plea of the general issue in bar of the action and he did not traverse the affidavit for attachment.

On the main issue on the merits of the plaintiff's action, we are of the opinion that the defendant's motion for a new trial should have been allowed.

The plaintiff's explanation of the $95.00 check is very unsatisfactory. He admits the checks he received in payment

for services when he was employed by George and his partner, were partnership checks, drawn on banks other than the State Bank of Chicago. There is no denial of the testimony that the defendant's bank account was kept in that bank and that his son George signed all the defendant's checks on that account. Nor is there any denial of the testimony that all partnership accounts of George and his partner were paid by partnership checks until July 1930, when George sold out his interest in the partnership.

From the testimony in the record there can be no serious doubt that the defendant left for Greece on June 6, 1930, as testified to by the defendant's son. There is nothing to the contrary in the plaintiff's testimony, who says that it was in June or July. Neither may there be any doubt of the fact that the defendant's son sold out his interest in the partnership of which he was a member, late in the month of July of the same year. It would seem from the plaintiff's testimony, that his position is that the $95.00 check introduced in evidence, was received by him from the defendant's son, in payment of wages due him from the latter,- whether at the dissolution of the partnership or before, is not clear nor is it important. In view of the testimony in the record, to the effect that the defendant's son did not dissolve his partnership until late in July, up to which time all partnership accounts were paid with partnership checks, drawn on the Sheridan Trust & Savings Bank, a fact which is corroborated by the plaintiff's own testimony, to the effect that while he was employed by the partnership he was always paid with such checks, it is quite impossible for us to believe that the plain-

tiff could have received the check, dated June 5, 1920, which, according to the date of its cancellation, was paid on June 9, 1920, in payment of wages due him from the partnership, that check being the personal check of the defendant who had nothing to do with his son's partnership, drawn on the personal account of the defendant in the State Bank of Chicago. On the other hand, the $95.00 check dated June 5, 1920, is entirely consistent with the testimony of the defendant's son, to the effect that on the evening before his father left for Greece, the latter and the plaintiff settled their account, finding that the payments which had been made by the defendant to the plaintiff, from time to time, totaled $205.00, leaving a balance due the plaintiff of $95.00, which was then paid by the check in question, being the defendant's personal check on his personal account in the State Bank of Chicago.

In the opinion filed in this court in connection with this case, in 228 Ill. App. 629, reference was made to the fact that an attempt had been made to take the deposition of the defendant in Greece, which failed because of the failure of the parties to whom the dedimus was sent, to follow instructions, a return being made consisting of the defendant's affidavit instead of his testimony. It may be that on another trial of this case the defendant's testimony or his deposition will be available. But, even without such testimony and contemplating only the testimony contained in this record, we are of the opinion that it is such as should not be held as warranting a judgment for the plaintiff.

Complaint is made by the defendant of an instruction

given at the request of the plaintiff, in which the jury was told, in substance, that if they believed the defendant had executed the note in question, then they should find the issues for the plaintiff and assess his damages at the sum of $300.00, with interest, "unless the jury further believe from the evidence that the defendant repaid such loan and must be proven by a preponderance of the evidence." The instruction is not properly worded nor is it very clear, but presumably, the last clause is to the effect that it was incumbent upon the defendant to establish the payment claimed, by a preponderance of the evidence. The instruction was not inaccurate in that respect. Payment is an affirmative defense, and if it is pleaded it is incumbent upon the defendant to establish it.

For the reasons stated, the judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

O'CONNOR, P.J. CONCURS;
TAYLOR, J. DISSENTS.

99 - 28750

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| MARY BROWN, GRACE BROWN, KARL BROWN and ALICE BROWN, minors, by their next friend, MARY BROWN, | 236 I.A. 621 |
| Plaintiffs in Error, | ERROR TO SUPERIOR COURT, COOK COUNTY. |
| v. | |
| CHARLES STAUSS (sued as CHARLES STRAUSS and HANS JORGENSEN), | |
| Defendants in Error. | Opinion filed Oct. 30, 1924. |

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiffs, minors, secured a judgment of $5,000 against the defendants, under section 9 of the Dram Shop Act, on June 8, 1920. In their declaration, the plaintiffs complained of the defendant Stauss, under the name and style of "Charles Strauss." The plea filed by that defendant was entitled, "Plea of Charles Stauss sued as Charles Strauss," and the body of the plea read, "And the defendant Charles Stauss (sued as Charles Strauss)"by his attorney comes and defends," etc.

The order of judgment gave the name of this defendant as it had been stated in the declaration, Charles Strauss, and gave the plaintiffs judgment for their damages of $5,000, against the "defendants" as so named.

On January 27, 1923, over two years after the judgment was rendered, the plaintiffs submitted a motion for an order to amend the record including the pleadings and the

judgment "by striking out the name Charles Strauss and substituting therefor, the name Charles Stauss," wherever such name appears. The court denied the motion. To reverse that order, the plaintiffs have sued out this writ of error.

The Statute of Amendments and Jeofails provides in the tenth paragraph of section 6 thereof, that a judgment shall not be affected by reason of any mistake in the name of any party "when the correct name " " " shall have been once rightly alleged in any of the pleadings or proceedings." It would seem therefore, that the judgment appearing in this record would be a good and valid judgment against Charles Stauss, even without the amendment sought to be accomplished by the plaintiffs, for the defendant by the plea which he filed "rightly alleged" his name and stated affirmatively that he was the individual whom the plaintiffs had sued under the name of "Charles Strauss."

But we further are of the opinion that the motion to amend should have been allowed, so as to clear up the record. That the writing of the name of this defendant as "Charles Strauss" wherever it so appears in the record, was a mistake, is apparent from the pleadings in the case, namely from the plea filed by that very defendant,- in which, he did not seek to make any point of the mistake as to the spelling of his name, but pleaded to the merits of the plaintiffs' alleged cause of action. The mistake was, therefore, one which might properly be corrected after the term at which the judgment was entered. Cowchran v. Hutchens, 18 Ill. 399. By such amendment there could not be said to be any change or modification of the judgment involved.

For the reasons stated the order of the Superior Court, denying the motion to amend, is reversed, and the matter is remanded to that court with directions to allow the motion.

REVERSED AND REMANDED WITH DIRECTIONS.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

153 - 28806

G. C. BUXTON,

Appellee,

v.

R. C. COOK, doing business as R. C. COOK COMPANY,

Appellant.

236 I.A. 621

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed October 30, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal, the defendant Cook seeks to reverse a judgment for $750.00 recovered by the plaintiff Buxton in the Municipal Court.

Cook was in the automobile business, dealing in Velie and Fiat cars. In November 1921, he entered into a written contract with one Wald, wherein he agreed to sell Wald a Velie car, estimated delivery to be about March 15, 1922. The purchase price of the car was not mentioned in the contract. By the terms of the contract, Cook agreed to allow Wald $750 for a used car he wanted to turn in on the purchase, "same to be applied as deposit on new car contract." Wald turned his used car over to Cook and the latter sold it in the course of his business. Thiscontract was entered into by Wald through one Nichols as agent for Cook.

In January 1922, Wald told Nichols he was not going to take the Velie car, under his contract with Cook, but was going to assign the contract to someone else if he could find

a purchaser and Nichols told him he would try to help him find one.

The plaintiff Buxton was also in the automobile business, dealing in Daniels cars. In April 1922, Buxton persuaded Wald to purchase a Daniels car from him, Buxton taking in part payment for it, Wald's contract to purchase a Velie car from Cook, on which there was $750.00 credit.

Soon after Buxton had taken over the Wald contract, he saw Cook and told him he held the Wald contract and wanted a Velie car as called for by the contract, he to pay the balance of the purchase price, after allowing for the $750.00 credit, and Cook said, "All right". Buxton said he wanted a Model 58, which was a new model, Cook declined to furnish that model claiming that the contract called for a Model 34, which was an old model. Cook testified he offered to furnish Buxton either a Model 34 or a Model 48. Buxton insisted upon Cook delivering a Model 58. This being refused, Buxton brought this action to recover the amount of the credit on the contract,- $750.00.

In support of his appeal the defendant claims that Wald breached his contract by not carrying it out himself and by telling Nichols he was not going to take the car called for by the contract and that this relieved Cook from performance with Wald, and that he, therefore, could not be required to carry out the contract with Wald's assignee. Such contention is not tenable. Wald did not breach the contract. Cook recognized the assignment of the contract to Buxton and agreed with Buxton to carry it out.

The question presented is whether Buxton had the right, under the contract, to demand a Model 58. The trial court, who heard the case without a jury, held that he did. That question was the subject of conflicting evidence. The copy of the contract held by Cook called for a Model 34 Velie, while the copy held by Buxton called for "one Velie automobile." Wald testified that, as originally drawn, the contract called for a Model 34 but that he objected to that feature of it; that this was an old model, whereas he wanted a new 1922 Model; that he explained this to Nichols, whereupon the provision referring to a Model 34 was taken out of the contract; that Nichols said he would have to wait until spring and he said that would be all right. Wald was corroborated in this by one Young who was present when the contract was entered into. He testified that when the contract was presented it called for a certain model, but just which one he could not remember, and upon objection to that feature of the contract by Wald, Nichols took it to one Campbell, who seemed to be in authority, and it was changed so as to call for any Velie car.

Nichols contradicted this testimony, saying that the contract called for a Model 34 Velie, at the time it was signed and that later it was changed by adding a provision as to a Model 48, so that Wald was to have the choice of either of those two models, at the date of delivery, which was March 15, 1922.

We are not in a position to disturb the finding of the court on this conflicting testimony. Even without the

aid of seeing the witnesses and hearing them testify, and merely considering the testimony as we have it on the printed page, there are two witnesses supporting the plaintiff's theory and one supporting that of the defendant. Further there are some circumstances that strongly support the plaintiff's contention as to the provisions of this contract. As presented in court, neither copy of the contract contained any reference to a Model 48. Is is significant that the purchase price was not included in the contract, which is more consistent with the theory that the contract called for one of the 1932 cars, none of which had been built as yet, the new model first appearing at the automobile show in February 1932, and Cook testifying they began to manufacture them in that month, than with the theory that it called for an old model. It is further significant that the contract provides, "we estimate" delivery will be March 15, 1932, which would be a natural provision, if a new model was involved, but not so, if it called for an old model, which had come out the previous year, as the evidence shows.

The defendant makes the further point that the plaintiff did not prove that the contract was worth $750.00 in cash, or that the car which Wald traded in on his contract was worth that amount in cash, or that the plaintiff had been damaged to that extent. Buxton testified that he took the contract from Wald, in trade, on the purchase of the Daniels car, for $750. That is the amount of credit specified in the contract. The defendant recognized the contract and treated it as binding in the hands of Buxton, and the only question which arose

was what model the contract contemplated. We consider this contention also, as untenable.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, PJ. AND TAYLOR, J. CONCUR.

159 - 38613

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| GROSSMAN SHOE CO., a corp., Appellee, v. SECURITY TRUST & DEPOSIT COMPANY, a corp., Appellant. | 236 I.A. 621<br>APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

Opinion filed Oct. 30, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal, the defendant, Security Trust & Deposit Company seeks to reverse a judgment for $5840.65, recovered by the plaintiff, Grossman Shoe Company, in the Municipal Court of Chicago.

The defendant owned and operated a safety deposit vault, in the building then known as the Masonic Temple in the City of Chicago. The plaintiff rented one of the boxes in that vault. On the evening of Saturday, August 27, 1921, the plaintiff deposited $5840.65 in its box. It was the custom of the defendant to keep their vault open nights as well as days. On the night of August 28, 1921, four men appeared at the defendant's vault, rented a box, were admitted to the vault, whereupon, they overpowered the defendant's employees then on duty, and robbed a number of the boxes in the vault, including that of the plaintiff, from which they removed all the money which had been placed there by the plaintiff on the previous day. The money was never recovered.

The four men were all strangers to the clerk of the defendant who was on duty at the time of the robbery.

In support of its appeal, the defendant contends that the plaintiff did not submit sufficient proof to establish the amount of the money contained in its box. The plaintiff's secretary and treasurer testified that on the evening of August 27, the day's receipts were totaled, the money counted and that he then placed it in the box in question; that the money, as counted, was the exact total of the sales as shown by the sales sheets, and that that total was $5840.65. The president of the company testified that the receipts from their sales for August 27, 1931, were deposited in the defendant's vault that night, but that, of his own knowledge, he did not know the exact amount. That testimony was sufficient. The fact that the circumstances might have been such as to enable the plaintiff to submit a greater quantity of proof does not, of course, make such competent evidence as he does submit, of no value.

The defendant contends further that the plaintiff failed to prove that the money in its box was lost through lack of ordinary care and diligence on the part of the defendant. In our opinion, the undisputed circumstances do show a lack of ordinary care. There were only two men in charge of the defendant's safety deposit vault on the night of the robbery. One of the guards was away on his vacation and nobody had been put in his place. Usually, at night, there were four men in charge of the vault. Admittedly, therefore, the vault was under-guarded, according to the usual and ordinary care exercised by the defendant in that regard.

Doubtless the defendant maintained a night vault to make it convenient for their box renters to have access to their boxes, outside of the usual business hours. But one in the exercise of ordinary care, in guarding the safety of the vault and its contents, would, in our opinion, entertain some suspicion when four men, none of them customers of the Deposit Company, and strangers to its employees, came to the vault at night, stating they had come to rent a box. When that did happen, and there was but one guard on duty, ordinary care on the part of the defendant's clerk who was on duty at the time, would seem to have called for the suggestion on his part that if the four strangers had anything they desired to place in the box that night, one of them might go into the vault for that purpose, while the others remained outside the vault door. The jury concluded that ordinary care and diligence in the guarding of its vault, was not exercised when the clerk admitted the four strange men to the vault, they having pretended to come there at that hour for the purpose of renting a box, and there being but one guard present. The question of whether, under all the circumstances, the defendant could be said to have exercised ordinary care, on the occasion in question, was one of fact, for the determination of the jury. They have determined that question adversely to the defendant. In our opinion, the evidence is such as to support that conclusion.

The judgment of the Municipal Court is, therefore, affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

171 - 28826

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| EVANSVILLE PACKING COMPANY, a corporation, Appellant, | 230 I.A. 021 |
| v. | APPEAL FROM MUNICIPAL COURT OF CHICAGO. |
| ROBERTS & OAKE, INC., a corp., Appellee. | |

Opinion filed Oct. 30, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Evansville Packing Company, brought this action against the defendant, Roberts & Oake, Inc., to recover damages for an alleged breach of warranty as to the quality of a lot of spare ribs, shipped by the defendant in Chicago to the plaintiff at Evansville, Indiana. At the close of the plaintiff's evidence, the court allowed the defendant's motion to instruct the jury to find the issues against the plaintiff, no privity of contract having been shown between the parties. Judgment having followed accordingly, the plaintiff has perfected this appeal.

Both the parties are meat packers. There was another packing house located at Detroit, Michigan, known as the Parker Webb Co. It was associated with an organization of packers called the Allied Packers. In November or December, 1919, a packing house broker, sold the plaintiff, apparently for the Parker Webb Co., through Allied Packers, a quantity of meat products, including 30,000 pounds of fresh frozen spare ribs, at

19 cents a pound. After delivery of 10,000 pounds of these spare ribs had been made, plaintiff received a letter on December 15, 1919, from Allied Packers reading as follows:

> "We bought today 20,000 pounds of spare ribs and 15,000 pounds of neck bones from Roberts & Oake, Chicago, and this car will be shipped next week. This will complete our sale to you of 30,000 pounds of spare ribs and neck bones."

Thereafter, the plaintiff received the shipment of 30,000 pounds of spare ribs from the defendant. These were billed from the defendant direct to the plaintiff at 19 cents a pound. The plaintiff received this bill or invoice from the defendant, together with a railroad receipt showing payment of the freight. The defendant drew its draft on the plaintiff for the amount of the invoice, and sent it, together with a bill of lading, to a bank at Evansville, where the plaintiff took up the draft and received the bill of lading. The plaintiff removed the spare ribs to its freezer and soon thereafter, out of the 190 boxes of spare ribs included in the shipment, 93 were found to be bad. Thereupon the plaintiff notified the broker of this fact, telling him that the 93 boxes of spare ribs had been condemned by a government inspector, and the broker notified the defendant and requested the defendant to send someone to inspect them before they were disposed of. The defendant then wrote the plaintiff declining to take any action in the matter, saying that it had not been advised of the condition claimed, until seven or eight days after the arrival of the spare ribs at Evansville and that they were in good condition when they left Chicago.

The plaintiff then disposed of the spare ribs in the 93 boxes at ½ cent a pound and brought this action against the defendant, claiming damages equal to the difference between 19 cents and ½ cent per pound, for the 93 boxes.

By its affidavit of merits the defendant set up that the sale of the 20,000 pounds of spare ribs, including the 93 boxes involved here, was a sale from the defendant to the Parker Webb Co. and not to the plaintiff and that it had shipped the spare ribs to the plaintiff and billed them to it, at the request of the Parker Webb Co. and that in this transaction it had acted as the agent for the Parker Webb Co. and that this fact was well known to the plaintiff. In the course of the testimony submitted on behalf of the plaintiff, one Mannheimer, plaintiff's president testified to the receipt of the letter of December 15, by the plaintiff, from Allied Packers and, on cross examination, he testified that "as a result of this letter of December 15th I knew that the car of meat which would arrive from Roberts & Oake was in response to a purchase made by the Allied Packers. We knew that under our contract with the Allied Packers, a car of meat would arrive from Roberts & Oake * * *."

In our opinion, these facts do not establish any direct privity of contract between the plaintiff and the defendant, as the plaintiff contends. The plaintiff admits that it knew from the letter of December 15, that the shipment it was to receive from the defendant, was a shipment of goods which had been purchased from the defendant, by the seller to the plaintiff, Allied Packers, and that the car which was to arrive from defendant was a shipment "under

our contract" with Allied Packers. By that letter the plaintiff was plainly advised that this shipment "will complete our (Allied Packers) sale to you." This meant clearly that the shipment received from the defendant was on behalf of Allied Packers and in fulfillment of its contract with the plaintiff. That situation was in no way altered when the goods were billed from the defendant to the plaintiff direct, and paid for in that way. The latter circumstance did not constitute a novation as the plaintiff contends. There was no substitution of contracting parties. Neither was any new contract entered into by the plaintiff. The plaintiff must be held to have received the goods from the defendant, not as principal seller, but acting for Allied Packers and in fulfillment of the contract of sale made by the latter with the plaintiff. No fact is shown by the plaintiff which extinguished the obligations of Allied Packers to it, under the contract of purchase and sale which existed between them. No inference to that effect may be drawn from the fact that the 20,000 pounds of spare ribs were billed and paid for as they were. There was no reason why the billing should not be in that form in behalf of the Allied Packers, just as the shipment was in their behalf, although by the defendant, from whom the purchase had been made by the Allied Packers. In order to establish a novation, it would be necessary to show a new contract entered into between the parties to this suit, in extinguishment of that which had been entered into between the plaintiff and Allied Packers. Williston on Sales, Vol. 1, Sec. 353; Karraker v. Eddleman, 101 Ill. App. 23; Hayward v. Burke, 151

Ill. 121; Commercial Nat'l. Bank v. Kirkwood, 173 Ill. 563. No such facts are shown by the plaintiff here. On the contrary, the shipment in question from the defendant to the plaintiff and accepted by the latter, involved a purchase by Allied Packers from the defendant, which was made not in substitution for and extinguishment of Allied Packers' contract of sale to plaintiff, but, as the letter of December 15, clearly says, to "complete our sale to you." Such a transaction could never amount to a novation, no matter what method of payment was adopted.

Likewise there is, in our opinion, no point to the plaintiff's contention that the defendant is estopped from now contending that its shipment was made on behalf of Allied Packers, because, when it was notified by the broker of plaintiff's claim, it declined to send a representative as the broker requested, because it had not been notified of the alleged condition of the goods until seven or eight days after they had arrived at destination and because the goods were in good condition when shipped. The elements necessary to an estoppel are not involved in such circumstances. Both parties were cognizant of all the material facts. No misrepresentation or concealment of fact was made by the defendant. Indeed the plaintiff makes no such claim. Such a situation precludes the existence of an estoppel. Holcomb v. Boynton, 151 Ill. 294; Siegel, Cooper & Co. v. Selby, 178 Ill. 210. Nothing that was either said or done by the defendant could have had the effect of causing the plaintiff to lose any rights as against the Allied Packers, or the Parker Webb Co. or to cause it to fail to notify them of its claim.

We find no error in the record, and therefore the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. DISSENTS;
TAYLOR, J. SPECIALLY CONCURRING:

This case is not free from difficulty. Still, as set forth in the majority opinion, (1) the fact that the plaintiff had been informed by the letter of December 15, that the Allied Packers had bought part of the merchandise which it had contracted to deliver to the plaintiff, from the defendant, and that it would be shipped in fulfillment of the Allied Packers' sale to the plaintiff, and (2) the fact the plaintiff when it paid the draft sent by the defendant and got the merchandise represented by the attached bill of lading, must be considered as accepting the merchandise pursuant to the letter of December 15, and (3) the further fact that the president of the plaintiff company testified that his company knew, as a result of the letter of December 15, "that the car of meat which would arrive from Roberts & Oake was in response to a purchase made by the Allied Packers," all taken together show that the Allied Packers bought the merchandise from the defendant; that the plaintiff when it received it, knew that fact, and, further, accepted it with that understanding.

180 - 28835

LAURA SCHWARTZ,

Appellee,

v.

GARDEN CITY WRECKING COMPANY,
a corporation,

Appellant.

236 I.A. 622

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Oct. 30, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff was the owner of certain premises located on West Twelfth Street in the City of Chicago, on which there was a three story brick and stone building, twenty-five feet wide and sixty feet long. In connection with the widening of Twelfth Street, the City of Chicago condemned a portion of the plaintiff's property, including the front forty-two feet of the building. In these proceedings, a judgment was entered against the City and in favor of the plaintiff by which the plaintiff was awarded $3,675.00 for the land taken and $4,700.00 for the improvements, "including all damage to the improvements not taken." The amounts so awarded, were paid to the plaintiff. In wrecking the building on the plaintiff's premises, under its contract with the city, the defendant removed not only the front forty two feet of it, but the remainder of it as well. The plaintiff alleged in her declaration that there was a bake oven located in the basement, in the rear eighteen feet of her building which was worth $2,000 and that, in connection with the wrecking of the building, the defendant had

torn down the oven and removed it from the premises, together with all the building materials and other fixtures included in the building.

The plaintiff brought this action of trespass against the defendant, seeking to recover damages for the alleged improper removal of the rear portion of her building and of the oven located in the basement of that part of her premises. The issues were submitted to a jury, resulting in a verdict in favor of the plaintiff, fixing her damages at the sum of $3,000. On a hearing of the defendant's motion for a new trial, the court stated that the motion would be granted unless the plaintiff entered a remittituref or $1,000.00. Thereupon, the plaintiff entered a remittitur in that amount and the court entered judgment for the plaintiff in the sum of $2,000.00. To reverse that judgment the defendant has perfected this appeal.

Previous to the institution of this suit, the plaintiff had brought another action against the City of Chicago and the defendant in the suit at bar, Garden City Wrecking Company. That case was dismissed as to the latter defendant and a demurrer interposed to plaintiff's declaration by the other defendant, the City of Chicago, was sustained and judgment entered against the plaintiff, which judgment was affirmed, on appeal to this court. Schwartz v. City of Chicago, 221 Ill. App. 328. In that case, we placed our decision, in part, on the ground that "under the decree entered by the court in the condemnation proceedings, the defendant, City of Chicago, acquired not only the right to possession of the portion of plaintiff's premises which was condemned,

but it became the owner of the part condemned, including the improvements, and the defendant also was decreed to pay the plaintiff a certain amount in payment of any damages that might be caused to the portion of the improvements not taken, by reason of the removal of that portion of the improvements which was taken."

The plaintiff's claim for damages in the case at bar may be divided into two distinct parts; first, damages for the alleged wrongful removal of the rear eighteen feet of her building, and second, damages for the alleged wrongful act of the defendant in tearing down and removing the oven.

As to the first element of damages claimed by the plaintiff; the trial court was of the opinion that the plaintiff was not entitled to recover, because the damages were included in the condemnation judgment. Three competent and well qualified witnesses who testified as to the value of the plaintiff's building, in the condemnation proceedings, testified in the case at bar. One Root testified that he appraised the plaintiff's building in the condemnation proceedings as $4,000; that "this included the entire building because I considered taking off forty two feet destroyed the building." One Scown testified that he put a value of $4,253.36 on the plaintiff's building in connection with the condemnation proceedings; that he appraised the whole building because "after taking forty two feet off, no man would think he had any value left because after a new front and a new stairway, called for by the ordinance, he would not have anything to rent, and it would not pay him to do that."

One Whinister testified that he valued the plaintiff's building at $4,267.20; that he "figured the whole building because the remaining part would not be practical for anything." In the judgment entered in the condemnation proceedings, the present plaintiff was awarded, and it is not denied that she received, $4,700 for the improvements on her property, which were taken, "including all damage to the remainder of said improvements not taken." The question of what the plaintiff received in the condemnation proceedings has nothing to do with the issues presented here except as it might throw light on the question of what the rear eighteen feet of her building might be worth after the front forty two feet was removed. The three witnesses already referred to, testified that the rear eighteen feet had no value, after the front forty two feet was removed; that there were some uses to which it could be put after necessary changes and alterations were made but that the latter would cost more than the building would be worth after they were made. The only testimony to the contrary, was given by the plaintiff's husband who was not shown to be qualified to testify on the subject or to know anything about it, beyond what he had been told by others. This witness was permitted to testify, over defendant's objection, that it would cost $12,000 to reconstruct the entire building (which was not a proper subject of inquiry) and $3,000 to reconstruct the rear eighteen feet of it. As already stated, the only competent evidence in the record, as to the value of the rear eighteen feet of the plaintiff's building, after the front part of it had been removed, was to the effect that it had no value.

As to the second element of damages claimed by the plaintiff, being for the alleged wrongful tearing down and wrecking of the oven; there was conflict in the testimony as to whether there was an oven in the rear of plaintiff's building, but there was sufficient evidence to sustain a finding that there was. The only evidence as to its value was that given by the plaintiff's husband. He was shown to be qualified to give evidence on this subject and he testified that the oven cost $3,000 and was worth $2,000 at the time it was removed. This is the testimony on which the trial court based its action in requiring the plaintiff to remit $1,000, reducing the verdict to $2,000 and in entering judgment for that amount.

In this, we are of the opinion that the trial court erred. While, as already stated, there is sufficient testimony in the record to support a finding that there was an oven in the basement of the rear eighteen feet of plaintiff's building and that the defendant removed it, the testimony on this point was in sharp conflict and a finding to the contrary on this issue, could not be said to be against the manifest weight of the evidence, or even against its preponderance. There is no possibility of determining what the jury based its finding on. It may have concluded that there was no oven in the building but that plaintiff was entitled to damages for the removal of the rear part of her building and based the verdict for $3,000 on the testimony of plaintiff's husband, that it would cost that amount to replace it. If so, the verdict, as a whole, could not stand. There is, of course, no proper basis for a contention that the jury

allowed $3,000 for the oven and $1,000 for the removal of the building. In such a situation, the verdict may not be helped by a remittitur. Chicago Union Traction Co. v. Lauth, 218 Ill. 176. The trial court gave several instructions based on the theory that the plaintiff was entitled to recover damages for the removal of her building. Being of the opinion, as announced on the motion for a new trial, that the plaintiff had no right of recovery as to that part of her claim, the court should have granted defendant's motion for a new trial.

For the reasons stated, the judgment of the Superior Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

28858

301 - 28858

236 I.A. 022

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|---|---|
| JOE JANKAUSKIS, Appellee, v. JOE BAUZA, Appellant. | APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

Opinion filed Oct. 30, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Jankauskis, brought this action against the defendant, Bauza, to recover the sum of $1,000, with interest from March 15, 1918, claiming that he had loaned that amount to the defendant at that time, upon the agreement of the latter to repay the money at the end of a year. The defendant denied that he had ever borrowed any money from the plaintiff, but contended that at one time the plaintiff had stated that he had loaned $1,000 to the defendant's wife, who had since died. The issues thus formed were presented to the trial court without a jury, each of the parties testifying in support of their respective contentions, and each presenting two other witnesses. After hearing the evidence, the trial court found the issues for the plaintiff, assessing his damages at $1345.00, which included interest, and entered judgment accordingly. To reverse that judgment the defendant has perfected this appeal.

There is a sharp conflict in the testimony. The

plaintiff was a nephew of the defendant, and he testified that he loaned the defendant $1,000 on March 15, 1918, as the defendant said he needed the money to make some repairs on his house; that he took no receipt for the money, the defendant stating that as he was his uncle, there could be no difficulty in the matter. The defendant's wife died in 1920. The plaintiff testified that at that time he spoke to the defendant about this money and the defendant reminded him that he was obliged to meet some very heavy expenses at that time and asked him to wait for his money, and he promised to pay it later. This conversation was heard by one Stankus. As we read the evidence in the record on the plaintiff's cross-examination, it is to the effect that when he paid the $1,000 over to the defendant it was all in cash, the plaintiff testifying that his brother was present at the time the money was paid over. On further cross-examination, the plaintiff admitted that he knew one Zacharewicz, but he denied that he had ever discussed the matter of this loan with him or asked him to bring suit against the defendant to recover it.

John Jankauskis, the plaintiff's brother, testified that he was present at the time his brother loaned their uncle, the defendant, $1,000.00 for the purpose of repairing his house and that on a later occasion he heard some talk between the two, on the subject, and heard the defendant say he would repay it, but explained that he could not do so at that time as he was short of money. The defendant apparently attempted to show that this witness was in the army in March 1918, at the time he testified that he saw

his brother give the defendant $1,000, and there was some cross-examination of the witness as to the time he went into the army and when he left it, but it was quite unsatisfactory - the witness explaining at one point that he did not remember dates. He stated during the cross-examination, that he was not in the army at the time the money was turned over to the defendant.

The witness Stankus, referred to in the testimony of the plaintiff, testified that he attended the funeral of the defendant's wife at the defendant's home, and that at that time he heard some conversation between the parties, in which the plaintiff asked the defendant for the return of his $1,000, and the defendant said to wait a little, that he had a lot of expenses, and that a little later he would give the plaintiff his money. This witness was a step-brother of the plaintiff.

The plaintiff called the defendant for examination, under sec. 33 of the Municipal Court Act, and he testified that he had put on some porches and repaired the roof of his house, and also put in a new foundation, after raising the building some, and that this work was done in 1918. When this witness was called to the stand to testify in his own behalf, he stated that the former testimony was incorrect and that this work was done in 1916. He denied that he had ever borrowed any money from theplaintiff or that he had had any conversation with him about returning $1,000. There was considerable examination of the defendant, tending to show that at the time of the alleged loan, both he and

his wife and two of his children were employed, all earning good wages. He testified further that the plaintiff's brother John was in the army in March 1918. He further testified that after his wife's death the plaintiff told him that he had loaned $1,000 to his wife. He admitted that the plaintiff and Stankus were at his home on the occasion of his wife's funeral, but denied the conversation to which they had testified. He admitted, however, that at one time, after the funeral, the plaintiff had asked him for a return of $1,000 and that he had made a similar request a second time, when the defendant went over to see the plaintiff's brother John, and attempted to collect $20.00 from him, which he had previously loaned him, the plaintiff being present at John's house at the time. The defendant's son testified to the effect that in the latter part of 1918, he accompanied the plaintiff to the bank, on an occasion when the plaintiff was going to deposit $500.00. He testified that his mother had told him that she had given this money to the plaintiff, but this testimony was stricken out. He also testified that the plaintiff's brother John was in the army in March, 1918, and that as far as he could remember he returned in May of that year.

The witness Zacharewicz, hereinbefore referred to, testified that about six months prior to the trial the plaintiff came to him and said that he had given some money to the defendant's wife; that the amount, so far as the witness could recall it, was $1,000, and the plaintiff wanted to know how he could go about collecting it.

After the defendant closed his case, the plaintiff was recalled to the stand and testified that his brother John went into the army in August 1918 and that he came back about a year later, namely, in August 1919. He testified further that repairs were made on the defendant's house in the summer of 1918, at a time when he, the plaintiff, was living in the house, on the second floor, and further, that he had never loaned any money to the defendant's wife.

In support of his appeal the defendant contends that the plaintiff failed to prove his case by a preponderance of the evidence, and that it is apparent from the record that this is the case, and that the judgment should be reversed for that reason.

The only question which can be considered in this court on that point is whether the finding and judgment of the trial court are against the manifest weight of the evidence. The evidence was in direct conflict. The trial judge saw the witnesses and heard them testify on the stand, and came to the conclusion that the plaintiff and his witness were telling the truth. We have given the substance of the testimony of the various witnesses. It would seem apparent that this court is not in a position to say that the trial court was not justified in coming to the conclusion reached, or that the finding and judgment are against the manifest weight of the evidence.

We find no error in the record and the judgment of the Municipal Court is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

313 - 28870

H. J. CARNEY, Doing Business as
H. J. CARNEY & COMPANY,

Appellee,

v.

BARNEY RUBIN, Doing Business as
International Talking Machine Co.,

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CHARLES COHNS, Garnishee,

Appellant.

236 I.A. 622

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 30, '24.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Carney, brought a fourth class action in the Municipal Court of Chicago, seeking to recover an amount alleged to be due him from the defendant Rubin, for goods sold and delivered. Service by publication was had on the defendant Rubin and an attachment in aid was issued, bringing the defendant Cohns into the case as garnishee. After a hearing, the issues were found for the plaintiff and judgment was entered against Cohns for $651.85. To reverse that judgment, Cohns has perfected this appeal.

The only point urged in support of the appeal is that the trial court erred in holding that an assignment of all the assets, by the original defendant, Rubin, to the garnishee Cohns, as trustee for the benefit of creditors, was not a transaction which came within the provisions and

and requirements of the Bulk Sales Act, and that it was therefore valid, notwithstanding the fact that the requirements of that Act had not been complied with, in connection with the transfer of the assets referred to. The point thus urged is not tenable. We have recently had occasion to hold the contrary. Ressler v. Sessman, et al, case No. 28551, Ill. App. Court, First District, opinion filed June 11, 1924, not yet reported, and cases there referred to. The ruling of the trial court was in accordance with the law. The judgment appealed from is, therefore, affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

329 - 22887

GORDON A. RAMSEY, Administrator of the Estate of Wojciech Wojdyla, Deceased,

Appellee,

v.

CHICAGO RAILWAYS CO., et al Doing business as the Chicago Surface Lines,

Appellants

236 I.A. 622

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

Opinion filed Oct. 30, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants seek to reverse a judgment for $2,000, recovered against them by the plaintiff administrator in an action brought by the latter in the Superior Court of Cook County, seeking to recover damages for the death of the administrator's intestate, who was shot and killed at the time he was a passenger on one of the defendants' cars, the shooting being done by another passenger. The issues were submitted to a jury on two counts of the plaintiff's declaration, one of which charged that the defendants were negligent in permitting the passenger who did the shooting, whose name was Christopulos, to enter its car with a revolver in his hand; and the other of which charged that the defendants were negligent in permitting a breach of peace to be committed upon their car. It is the defendants' contention that under the evidence there cannot be said to be any liability on their part under either count of the declaration on which the case went to the jury.

It will be necessary to state the facts briefly as disclosed by the testimony given by the different witnesses. The incident in question occurred on a car which was going south along Kedzie avenue in the City of Chicago and the shooting took place while that car was in the neighborhood of 45th street. The man who did the shooting boarded the car at 41st street. One Hritzuk testified that he was standing on the front platform of the car; that there was no quarrel or any disturbance before the shooting took place; that the first thing that happened was when Christopulos started shooting; that just before this occurred, Christopulos put his hand inside his coat, and as soon as he took his hand out he fired; that the first shot struck the witness, whereupon, the latter ran toward the back of the car. There were eight or ten people on the front platform at the time. This witness knew neither the man who did the shooting nor the plaintiff's intestate. One Kondrisck testified that he was standing near the exit door at the front of the car, apparently meaning the door leading from the body of the car to the platform; that the first thing that drew his attention to the occurrence was the shooting; that as soon as he heard that, he started to run toward the rear; that he noticed the man who did the shooting was wearing a star on his coat, which looked like a policeman's star; that he did not notice this man until the shooting started; that prior to the shooting there was no loud talking or any quarreling. This witness testified that he had not noticed Christopulos as he went by on his way through the car to the front platform. This witness, likewise, knew neither Christopulos nor the plain-

tiff's intestate.

One Donnelly, the conductor of the car, testified that he first saw Christopulos when he boarded the car at 41st street; that he had never seen him before that time; that when the car stopped at 41st street two men got on, as the car was standing still, and just after the car started up Christopulos and another man boarded the car; that Christopulos paid two fares, one for himself and one for the other man who boarded the car at the same time he did; that Christopulos was excited and looked as though someone was chasing him; that he was wearing a star on his coat and that he was holding a gun in one of his hands; that as soon as the fares were paid Christopulos, and the man who was with him, walked into the car. This witness testified that he could not see whether Christopulos still had the gun in his hand when he went into the car or not; that he presumed Christopulos was a police officer - "I figured that this fellow was a police officer and that he was taking care of the other three that was getting on;" that the first knowledge the witness had of any threatened shooting was when he heard the shots up at the front platform; that up to that time he had not anticipated any trouble. This was all the evidence introduced by the plaintiff relating to the occurrence.

For the defendants, by agreement of the parties, the testimony given by Christopulos at the coroner's inquest was read. This testimony was to the effect that he was in the employ of Mooney & Boland, a detective agency, and was assigned to work as a guard at the yards of the Crane Company, where, it appears from the record, there was a strike in progress;

that the revolver which was in his possession at the time of this occurrence was his personal property; that he had previously been employed by another detective agency, during which time "he received authority to carry it (the revolver) at 308 City Hall Building;" that at thetime he got on the car on the evening in question, he did not have the revolver in his hand and that he did not draw it out of his pocket until after he had gone to the front end of the car and was standing on the front platform; that as he was standing there, near the motorman, one Gritsuk, (a man he pointed out at the coroner's inquest) stepped up to him "and was feeling with my pockets and asked me what my capacity was and looked me over;" that at the same time, the plaintiff's intestate grabbed the witness by the neck and started to choke him; that the witness then put his hand in his pocket and got hold of his revolver and fired, "because I was defending my life;" that he did not use his revolver until his life was in danger and he had to; that he was wearing a star on his coat at the time of the occurrence.

We are of the opinion that the evidence thus submitted, fails to establish any liability on the part of the defendants, under either count of the declaration on which the case went to the jury. One count charged that the defendants were negligent in permitting Christopulos to enter the car with a revolver in his hand. The duty of carriers, with regard to the admission of passengers to cars, is not such as to require them to exercise the skill of detectives or psychologists. It merely requires them to exercise reasonable care, as occasions such as the one at bar pre-

sent themselves. In our opinion, it may not be said that there was any lack of such an exercise of reasonable care on the part of the defendants' conductor, when he allowed Christopulos to board the car and become a passenger. There were indications from which the conductor might very well conclude that he was an officer. While he seemed to be somewhat excited, the conductor testified that he had the impression this was due to the fact that Christopulos had been chased by someone. That being the situation, it was quite natural for him to consider that the revolver, which he says Christopulos had in his hand, was being carried there in connection with some occurrence that was passed, rather than in anticipation of one which was about to take place. The uncontradicted evidence is that Christopulos was a private detective, authorized to carry a gun. Under the evidence submitted in behalf of the plaintiff, Christopulos, at the time he boarded the car and, as long as he was within the conductor's view, was not using or displaying his revolver in a threatening manner,- he was merely holding it in his hand at the time he got on the car and when he paid his fare. The conductor could not even remember whether he continued to hold it in his hand or not. If Christopulos was one who purported to be a police officer or detective, the conductor would have no right to refuse to permit him to get on the car or to go into the body of the car. Even if he were a private individual and he boarded the car with a revolver in his hand, and was excited and gave the appearance of having been chased by someone, and he gave no evidence of making trouble or wanting to assault anybody, and was not displaying his weapon in any threatening manner, but rather gave evidence

of a desire to escape someone who had been after him, the conductor would not have been warranted in refusing to permit him to enter the car. But this man wore a star, and the conductor, in our opinion, did not act unreasonably when he concluded that Christopulos was a police officer. Some of the evidence submitted in behalf of the plaintiff, shows or tends to show that at the time the conductor permitted Christopulos to enter the car, he was conducting himself in an unlawful or threatening manner.

The negligence charged against the defendants in the other count, was that they had negligently permitted a breach of the peace to be committed upon their car. According to the plaintiff's own witness, Christopulos, without warning or provocation of any kind, suddenly drew out his revolver and began shooting. There is no evidence whatever, in the testimony of the plaintiff's witnesses, tending to show that anything occurred from which the defendants' servants could possibly have anticipated that a breach of the peace was about to be committed. On the theory of the testimony submitted by these witnesses, there was no opportunity whatever for the defendants' servants to either anticipate or stop the shooting. The shooting occurred some minutes after Christopulos had boarded the car and walked through and out to the front platform. On the theory presented by the testimony of the only other witness in the case, namely, Christopulos, himself, the plaintiff could not recover because the plaintiff's intestate brought the injuries received upon himself, by first attacking Christopulos and threatening his life. The plaintiff cannot invoke the protection of the carrier's servants against the

consequences of his intestate's wrongful acts. On either theory, therefore, we are of the opinion that there could be no liability under the count last referred to.

The plaintiff in support of the judgment appealed from cites many cases passing upon the liability of carriers, as a result of negligent conduct of their employees, in failing to anticipate or prevent injury to passengers, as a result of the conduct of other passengers or persons. It would serve no useful purpose to analyze them, as all the facts in this case were materially different from those presented in the cases cited. It is alleged that in the case at bar it was at least a question for the jury to determine, whether, under the evidence, there had been any negligence proven, as charged in the declaration, on the part of these defendants. For the reasons we have stated, our opinion is to the contrary. There is no evidence in the record, showing or tending to show either that the defendants were negligent, in permitting Christopulos to enter the car and become a passenger, under all the circumstances disclosed, or in permitting a breach of the peace to be committed on the car. In that situation we are of the opinion that the trial court would have been justified in directing a verdict on the ground that the evidence did not tend to establish the cause of action alleged.

In this case no occasion is presented for passing on the credibility of witnesses or weighing conflicting evidence, so as to determine whether the verdict and judgment

were against the manifest weight of the evidence. We have merely to determine whether, in our opinion, there is room for a reasonable difference of opinion as to proof of the negligence charged, on the whole evidence, considered most favorably for the plaintiff. In Mirich v. Forschner Contracting Co., 312 Ill. 343, our Supreme Court has said that section 130 of the Practice Act, specifying that if any final determination of any case shall be made by this court, as a result, wholly or in part, of the finding of the facts concerning the matter in controversy different from the finding of the trial court, it shall be the duty of this court to recite the facts as found in its final order, was intended only to apply to cases where a jury was waived in the trial court by agreement of the parties, "or where tried by a jury, the trial court would have been justified in directing a verdict because the evidence did not tend to establish a cause of action, but refused to do so, in either of which cases this court may reverse the judgment with a finding of fact." In the case at bar this court is determining the cause as a result of our finding the facts different from the finding of the trial court, in that the trial court considered that the record presented some evidence tending to establish the fact of negligence relied upon by the plaintiff and that it should, therefore, be submitted to the jury (Libby, McNeill & Libby v. Cook, 222 Ill. 206) whereas this court is of the contrary opinion. Therefore, under section 130 of the Practice Act, as we understand the construction of that act, by our Supreme Court in the Mirich case, this court should reverse

the judgment appealed from, with a finding of facts. Such will be the order here.

JUDGMENT REVERSED WITH A FINDING OF FACT.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

FINDING OF FACT:

We find as a fact that the defendants were not negligent either in permitting Christopulos to become a passenger upon their car or in permitting a breach of the peace to be committed, as alleged in the declaration.

117 - 29526

CHICAGO LINCOLN CLUB,
a Corporation,
Plaintiff in Error,

vs.

ORVILLE H. SMITHER,
Defendant in Error.

236 I.A. 323

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a fourth class case in which the issues were found against the plaintiff. It was allowed sixty days from the date of the judgment, April 3, 1924, in which to file a bill of exceptions. Without any authority so to do after the expiration of thirty days from the date of the judgment, (Lassers v. North German Lloyd Steamship Co., 244 Ill. 570) the court on May 24, 1924, extended the time twenty days from June 2, 1924, and on July 3 following entered an order that a stenographic report then presented be approved and filed nunc pro tunc as of May 24, 1924.

On the ground that the court had no power to enter such order, defendant in error has moved that said stenographic report be stricken from the record, and that as no assignment of error is based on the remaining part of the record the judgment be affirmed. Upon these facts the contention is unassailable and the motion will be allowed and the judgment below affirmed. (Lassers case supra, and People v. Rosenwald, 266 Ill. 548.)

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

344 - 29761

WALLENBERGER & COMPANY,
Appellee,

vs.

JACOB KATZ,
Appellant.

236 I.A. 623

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $125 and costs. An incomplete copy of the record was filed, and on the second day of the term thirty days additional time to complete the same was allowed. Appellant not having filed a complete transcript within that time appellee moves to have the judgment affirmed. As none of the assignments of error rests upon the part of the record filed the judgment will be affirmed, and under section 101 of the Practice act ten per cent damages on the amount recovered will be allowed.

AFFIRMED.

Fitch, P. J. and Gridley, J., concur.

109 - 20197

PRICE IRON & STEEL COMPANY,
a Corporation,
Appellee,

vs.

E. MARX and I. MARX, Co-partners,
Doing Business as A. MARX & SONS,
Appellants.

236 I.A. 623

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff filed its statement claiming damages on account of an alleged breach of a contract of sale in that defendants failed to furnish certain scrap iron of the kind contracted for. Two affidavits of merits filed by defendants were stricken on the ground of insufficiency. A third affidavit of merits was tendered, but the court refused to allow it to be filed, a default was entered against defendants for want of an affidavit of merits and judgment was entered in favor of the plaintiff for $893.50. Defendants appeal, asserting that the third affidavit of merits presented a good defense and that it was error for the court not to allow them to file it.

The plaintiff, appellee here, has moved this court to strike the bill of exceptions from the record upon the ground that it does not purport to be a statement of facts as required by the provisions of the Municipal Court act. We have heretofore denied this motion for the reason that this is an appeal and controlled by section 81 of the Practice Act, chapter 110, and not by the provisions of the Municipal Court act relating to writs of error. Israelstam v. U. S. Casualty Co., 278 Ill., 161.

It is not necessary for the record to show an order of the court that the bill of exceptions be filed. City v. South Park Commissioners, 169 Ill. 387; East St. Louis v. Vogel, 276 Ill. 490.

Plaintiff's statement of claim alleged in substance that June 20, 1923, it purchased from defendants 100 gross tons short rails, five feet and under, at $22 per gross ton, f. o. b. Bettendorf, Iowa, to be delivered within three weeks; material to be subject to and governed by the weights, grading and inspection of the consumers receiving the same, and settlements to be made accordingly; that plaintiff had paid to defendants upon the contract $1330.64; that short rails five feet and under in the scrap iron trade are known as rails free from scale, rust, concrete, cement, and any other foreign material; that when the rails in question arrived at destination, the rails were found to be covered with heavy scale and were rusty and had upon them concrete and cement, and that thereupon the Bettendorf Company, the consumer, refused to accept them; that when the rails were refused plaintiff notified defendants, who agreed to accept the return of the material and return the money paid; that as the cars were at Bettendorf, Iowa, and car service and demurrage charges accruing, in order to save the material from loss plaintiff sold it, realizing certain amounts, leaving a balance due from plaintiff to defendants. Plaintiff also claims a loss on account of defendants' failure to ship rails of the kind contracted for.

The affidavit of defense tendered by defendants alleged that the scrap iron rails described in the contract as short rails five feet and under include two distinct kinds of rails, one known as "tee" rails and the other as "girder" rails, and that the tee rails sell at a higher market price than the girder rails; that at the time the contract was entered into plaintiff was told by defendants that they had no tee rails but had a supply of girder rails,

and that it was agreed by and between the parties that the sale should be of girder rails to be delivered to the Bettendorf Company, Bettendorf, Iowa; that defendants were not advised and did not know that plaintiff had contracted with the Bettendorf Company to furnish it tee rails; that the girder rails furnished were of good merchantable quality and of a grade equal in every respect to the terms of the contract; that the rails were not rejected by the Bettendorf Company on account of their being an inferior grade and quality of girder rails, but solely on the ground that the contract between plaintiff and it was for tee rails and not girder rails; and that defendants did not at any time contract or agree with plaintiff to furnish it tee rails at the price of $32 per gross ton. The defendants further asserted that short rails five feet and under are not known in the scrap iron trade as scrap iron rails free from scale, rust, cement, or other foreign material, and especially is it true that such is not the meaning of short rails five feet and under known as girder rails, but on the contrary it is understood in the scrap iron trade that girder rails are not entirely free from concrete, cement and other foreign materials; that the cars delivered contained good merchantable girder rails in exact compliance with the contract; that by the terms of the contract the grading and inspection by the consumer were upon condition that the property was the kind of property which the consumer had purchased and was not intended to operate and govern settlement except in case the consumer received the character of goods which the consumer purchased from the plaintiff. Defendants denied that they agreed to accept the return of the material and repay the plaintiff the amount of money advanced. Defendants alleged compliance with the contract and that there was a balance due to it from plaintiff.

Defendants' tendered third affidavit of merits present issues of fact upon which they were entitled to a trial. Both plaintiff's statement of claim and the affidavit of merits allege that the exact kind of rails mentioned in the written memorandum of sale cannot be definitely ascertained without parole testimony. Plaintiff alleges that the terms used indicate in the trade a certain kind of rail, and this is denied by defendants' affidavit, which asserts that they include two distinct kinds, namely, tee rails and girder rails.

We hold that the affidavit of merits tendered by the defendants on December 15, 1923, sufficiently presented issues of fact which if proven would be a defense to plaintiff's claim, and that it was error for the trial court to refuse to allow it to be filed.

The judgment is reversed and the cause is remanded for further proceedings consistent with what we have said in this opinion.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

162 - 29251

236 I.A. 623

LOUIS NORDONSKY,
Appellee,

vs.

MORRIS BENNER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for real estate broker's commissions, upon trial had a verdict and judgment for $1,000. There have been two trials with the same result.

It was sufficiently established by the evidence that plaintiff, a licensed real estate broker, in February, 1930, called at defendant's home, 3520-22 Douglas boulevard, in Chicago, and inquired if defendant's building was for sale, and was told that it was at the price of $37,000, $10,000 in cash, the assumption of a first mortgage of $18,000, and the balance of $9,000 secured by a second mortgage. Defendant further said that if plaintiff would procure a purchaser at this price and on these terms he would pay plaintiff $1,000 as commission. Plaintiff said that he had a customer who was looking for something suitable to buy. Thereafter plaintiff went to Sam Schneider and Mrs. Schneider and submitted the property to them at the price and on the terms given by defendant. They were favorably impressed and went with plaintiff and examined the building and decided to buy it at the price stated. An appointment was made to go to the office of defendant to sign a contract. At the appointed time Sam Schneider, with a business partner and plaintiff, called at defendant's house, Schneider bringing with him $1,000 in currency as earnest money. Defendant was informed that Schneider had come to enter into a contract for the purchase of the property

and had brought $1,000 with him as a deposit, as defendant had theretofore instructed the plaintiff. Defendant stated that these terms were satisfactory, and he and Schneider agreed to enter into a written contract. Schneider started to call for his lawyer to come to the house to prepare a written contract, when defendant suddenly told Schneider that he had changed his mind about the price, that he wanted $40,000 for the property instead of $37,000. Schneider replied that he had come to buy the property for $37,000 as had been agreed. There was some argument over the matter but defendant insisted upon the increased price. Schneider went away. Upon plaintiff reminding defendant of the agreed commission of $1,000 if a purchaser at $37,000 was produced, plaintiff was told by defendant that he would have to sue defendant for the commission.

Plaintiff's statement of claim alleges that the parties intending to buy the property were Sam Schneider and his wife, Leah, and defendant urges that there is a material variance in that the evidence fails to show that the wife intended to purchase. There are two complete answers to this: (1) The record fails to show that defendant made any objection upon the trial upon the ground of variance, and is raising this point for the first time upon review. Pihl v. Springfield Consolidated Ry. Co., 219 Ill. App. 588; Rusicka v. Lau, 207 Ill. App. 336; Kirn v. Chicago Journal Co., 195 Ill. App. 197. (2) The evidence shows that both Mr. and Mrs. Schneider were buying the property. So there was in fact no variance between the allegation of the statement of claim and the evidence.

It is said that plaintiff failed to prove that Mr. and Mrs. Schneider were financially able to buy the property. The record shows that the defendant's attorney objected to questions put to the witness Schneider touching his financial means. Questions as to whether Schneider owned any property were objected to as immaterial and the objection was sustained. These questions were all

competent as touching the point of the proposed purchaser's ability to carry out his contract. Furthermore, the rejection by defendant of the proposed sale was not upon the ground that the Schneiders were not financially able to buy, but because defendant demanded an increased price. Pusey v. Varland, 224 Ill. App. 35, is precisely in point, where the court held, under similar circumstances, that whether the proposed purchaser was able to purchase was a question of fact, and "that plaintiff was not bound to go into the details of the financial condition and resources of the proposed purchaser in chief, though he could have done so, and those were proper matters for cross-examination. Defendant, having prevented plaintiff from obtaining an answer to that direct question, cannot now complain that the proof it called for is lacking. Pollett v. Illinois Cent. R. Co., 200 Ill. App. 283, and cases cited on p. 292." See also Phillips v. Dexhower, 103 Ill. App. 50; Smith v. Keeler, 31 Ill. App. 267; Farrell v. Almgren, 211 Ill. App. 654.

The evidence shows that Mr. Schneider was a partner in a mercantile business in Chicago and that he and his wife had property and money.

The judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

233 - 29322

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|---|---|
| CLARA COWAN, Appellee, vs. YELLOW CAB COMPANY, a Corporation, Appellant. | 236 I.A. 623<br>APPEAL FROM SUPERIOR COURT OF COOK COUNTY. |

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff claims that while on the sidewalk at the north west corner of Dearborn and Monroe streets in Chicago, she was struck and injured by a cab belonging to and operated by defendant. She brought suit to recover damages for the injuries and upon trial had a verdict for $13,500. Defendant appeals from the judgment thereon.

The first count of the declaration charged negligent operation of the cab so that it ran into and collided with plaintiff. The second count charges that defendant negligently operated the cab in failing to keep a proper lookout so as to have discovered plaintiff upon the street.

The occurrence was about six o'clock in the evening of November 29, 1922. Plaintiff was walking alone eastward on the sidewalk on the north side of Monroe street approaching Dearborn street. When she reached Dearborn she waited at the corner on the sidewalk for a street car coming from the north on Dearborn to turn west into Monroe street. It was during the rush hour and many people were then on the sidewalk. The traffic was controlled by traffic officers giving signals. When the signal for the north and south traffic on Dearborn to proceed had been given, the street car turned around the corner westerly into Monroe and the front part of the cab in question (a "Yellow cab") came up onto the sidewalk at or near the place where plaintiff was standing. She claims the cab

struck her but defendant disputes this, claiming that she was knocked down by the overhang of a trailer attached to the street car, going around the corner. She was picked up and taken to a hospital and the proof tended to show that she suffered a fracture of the neck of the left femur.

Plaintiff, under the first count of the declaration, attempted to prove that defendant's cab came from the north on Dearborn and ran alongside of the street car, between it and the west sidewalk; that when the street car turned westerly into Monroe the chauffeur, in order to avoid colliding with the street car, turned his cab westerly and ran the front part of it onto the sidewalk, striking the plaintiff. Defendant's version of the accident was that the cab came from the north on Dearborn and stopped with the traffic north of Monroe, west of the street car tracks; that a street car also came on Dearborn street from the north and stopped east of the cab. When the signal for the north and south traffic on Dearborn to move had been given and the street car started to turn around the corner into Monroe, the cab did not start because the street car blocked its way. The cab was standing a sufficient distance from the street car to permit it to turn without coming in contact with the cab, and the car did turn around the corner without touching the cab. Trailers attached to street cars had recently been put in operation and one was attached to this street car. The chauffeur of the cab had never seen a street car with a trailer come around that corner prior to that time and he did not know that a trailer was attached to the street car on this occasion as he was waiting for it to make the turn. This trailer had a greater overhang than had the street car, so that as it followed the street car in making the turn it came in contact with the cab and pushed its front end up onto the sidewalk. Defendant claims that the cab did not touch

plaintiff, but that she came in contact with the side of the trailer as it went around the corner and overlapped the sidewalk.

We hold that plaintiff failed sufficiently to prove that the cab was negligently operated and run so as to strike plaintiff and that the greater weight of the evidence tends to support defendant's theory of the accident with reference to what caused the front wheels of the cab to go upon the sidewalk. Six witnesses, including plaintiff, testified for plaintiff as to the occurrence. None of them undertook to testify as to what caused the cab to go upon the sidewalk. It was first seen by all, except two, just as it was coming up onto the sidewalk. These two were a Mr. Penovich, who was knocked down by the cab, and his daughter; they testified that when they first saw the cab it was on Dearborn street coming south at a distance of about 100 feet from Monroe, but that from this point they did not notice it again until it started to come up on the sidewalk. There was a lack of any testimony that the car was run onto the sidewalk by the chauffeur. To support defendant's version of the occurrence the chauffeur testified that he stopped his cab alongside the street car and stood still to let it go by; that the street car went around the curve but as the trailer made the turn it pushed the cab along up onto the sidewalk; that he was acquainted with that corner and was familiar with the traffic there, and this was the first time he had ever seen a trailer on that street or going around the corner. Two other occurrence witnesses, apparently disinterested, testified that they were standing on this corner and saw the trailer as it came along push the cab up onto the sidewalk. These witnesses testified positively that the cab did not start when the traffic signal was given but was standing still when struck by the trailer. One of these witnesses testified that she was standing close to the cab and that the front street car passed it all right, "and then

the trailer came along and the cab was at a standstill and it got hit." Other witnesses testified that the use of the trailers at this corner was of recent occurrence, and that they overhung the sidewalk more than the street cars did.

Upon this record we hold that the verdict is manifestly against the weight of the evidence and that the judgment should not stand.

It is a controverted question of fact as to whether plaintiff was struck by the cab or by the trailer. This is a close question and there is a direct conflict of testimony on this point.

One of the witnesses, Dr. Bagdadi, was permitted, over objection, to testify as to the injuries of the plaintiff based upon what he found and from X-ray pictures. These alleged X-ray pictures were never in evidence, and the motion to strike his statement based on them should have been allowed.

It was also error to permit the doctor to refresh his recollections from a memorandum as to the number of visits he made and the number of treatments he gave plaintiff where it was shown that the memorandum was a bill which he rendered for services and made out shortly before the trial. The memorandum was not an original entry made at the time of the happenings, and his testimony based thereon should have been stricken out. Borrance v. Dearborn Power Co., 223 Ill., 354.

Certain X-ray films were introduced in evidence without proper identification. No witness testified that there was anything on the films by which it could be told that they were pictures taken of plaintiff. The proper way to qualify X-ray pictures for admission as evidence is given in Stevens v. Illinois Central R.R.Co., 306 Ill. 370.

We also hold that upon the record before us the jury

should have been instructed that there was no evidence fairly tending to support the charge of negligence in failing to keep a proper lookout, as stated in the second count of plaintiff's amended declaration.

For the reasons above given, the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, J., concurs and Johnston, J., took no part.

29204

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236 I.A. 624

In the matter of the estate
of MARIA D. BUDDINGTON, deceased,

MARGARET H. LARDER,
Appellee,

vs.

NATHANIEL M. JONES, executor
of the estate of Maria D.
Buddington, deceased,
Appellant.

APPEAL FROM
CIRCUIT COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

By this appeal, Nathaniel M. Jones, as executor of the last will and testament of Maria D. Buddington, deceased, seeks to reverse a judgment of the Circuit Court directing him to pay, in due course of administration, to Margaret H. Larder, hereinafter called the plaintiff, the sum of $8198.32. Plaintiff's claim was for "domestic services, nursing, care of garden, premises, commercial business as agent, and as companion to and for" the testatrix during the last five years of her life.

The testatrix was a widow, and at the time of her death, in January, 1921, was over eighty years of age. During the last fifteen months of her life, she lived in a ten-room house on Kedvale avenue, in Chicago, for which she paid $16,000 in September, 1919. Besides this property, she left personal property valued at approximately $20,000. Her nearest relatives were three granddaughters and the daughter of her deceased grandson, none of whom lived with her. By her last will and testament, made six months before her death, she gave to these relatives legacies aggregating $5,000, gave $500 to a friend, gave to the plaintiff (whom she called in the will her "faithful friend and helper") $3000 and all the household furniture and personal effects

in her homestead, and "all the chickens on said place," and bequeathed the residue of her estate to Nathaniel M. Jones, as trustee, "to organize, conduct and support a Bible school, to be known as The Buddington Memorial Bible School," to which, when incorporated, such residue was to be transferred.

The husband of the testatrix died in 1915. She then lived in a nin-room house on Indiana avenue, adjoining which there was a garden covering about fifty by sixty feet of ground. For fifteen years, or more, prior to Mr. Buddington's death, plaintiff was employed as a domestic in the Buddington family, consisting of Mr. and Mrs. Buddington. After his death, she remained with Mrs. Buddington in the same capacity, and apparently did all the housework and the house-cleaning, attended to the furnace and the garden, and after the removal to Kedvale avenue, looked after the chickens "on the place." From the credits shown on the plaintiff's claim, it would appear that she was paid for her work about fifteen dollars a month and her board.

In the summer of 1919 Mrs. Buddington "fell down the back steps" and was in bed for two weeks with an injured hip. During that time and the following convalescence, plaintiff was her only nurse. During the last year of her life, the testatrix suffered from an infection above the eye, which required frequent dressing. This was done by the plaintiff. Most of the time during that year the testatrix was confined to the house and a large part of that time to her bedroom. There is some evidence tending to prove that on several occasions, the testatrix said that she intended to reward the plaintiff for her care and attention by "remembering her in her will." Two of plaintiff's witnesses testified that Mrs. Buddington promised them also to remember them in her will for services they had performed, but failed to keep her promise. One of these witnesses testified further that in November, 1920, the testatrix told him "she had left" the

plaintiff $10,000. This was several months after her will was made leaving plaintiff $3000 and the household effects and the chickens.

Mrs. Buddington's will was admitted to probate in February, 1921. Soon after, plaintiff called at the office of the executor and said she thought she ought to be paid something more than the legacy of $3000 for the services she had rendered to the deceased. The executor told her she could file a claim against the estate and if she thought she was entitled to anything more, she should have a claim prepared and filed. A few days later, plaintiff presented to the executor an itemized claim for services rendered to the testatrix during the last five years of her life, at the rate of from thirty to fifty dollars a week, aggregating $9245, upon which was credited $824 as cash received by her during that time, leaving a balance of $8421. The executor told her the bill was unreasonable, that he could not approve it and that he thought the court would not allow it; but he finally said he would take the matter up with the residuary legatees, the trustees of the Bible school. This he did, and the trustees recommended that he approve the claim for $5,000, or for $4,000 with the use of the homestead for one year at a rental of $1000. This being reported to the plaintiff, she agreed to accept $5,000, payable $4100 when the estate was settled, and $900 in rent of the homestead for one year, and the executor agreed to approve her claim to the amount of $5,000, on that basis. A written agreement to that effect was prepared by the executor and signed by the plaintiff, who also signed a lease of the homestead for one year. Under this agreement, plaintiff remained in possession of the homestead for the year mentioned, and at the end of the year, the estate not being settled, she signed a lease for another year and remained there that year without paying rent for either year.

Acting upon the settlement agreement thus made, the

executor endorsed on the back of the claim plaintiff had left with him the entry of his appearance as executor and his consent to the allowance of the claim for $5,000. It was then filed in the Probate Court. When it was reached on the call of the claim docket, the judge of that court directed the clerk to "enter judgment for $5,000," but through some mistake of the clerk, an order was entered allowing the claim for the full amount. The plaintiff discovered this fact before the executor did and then said she was going to demand the full amount regardless of her agreement, whereupon the executor filed a petition in the Probate Court to reduce the judgment to $5,000 in accordance with their agreement. The judgment was set aside and the claim set for hearing. Thereupon the plaintiff filed an amended claim increasing the amount claimed to $11,922.50, based upon a weekly charge for her services of from forty-five to sixty dollars a week, and an additional item of $600 for a commission for selling a patent owned by the deceased. In due course the matter was heard in the Probate Court and an order was then entered allowing the claim for $5,000, less $1800, the amount of rent which had accrued from the plaintiff's occupancy of the homestead of the deceased for two years. From this order plaintiff appealed to the Circuit Court, where the case was tried de novo before the court and a jury. The record recites that "the jury first presented a verdict for $11,922.50, in open court and the court refused to accept it unless a deduction of $3,000 was made on account of the legacy paid to said claimant under the terms of the will, and thereupon the amount of the verdict was changed from $11,922.50 to $8922.50 and the verdict received and filed." Upon the motion for a new trial the plaintiff remitted $724.18, "being interest deducted," and a judgment was entered for the remainder.

It is contended by counsel for the executor that the instructions given were confusing, contradictory and misleading.

after a careful consideration of these instructions in the light of the facts as hereinabove set forth, we are of the opinion that the contention must be sustained.

Several of plaintiff's instructions direct a verdict for the plaintiff if the jury believe, from the evidence, that the facts are as therein set forth, and they omit all reference to the evidence concerning the agreement made by the plaintiff to accept $5,000 in lieu of her claim.

By the first instruction given on behalf of the plaintiff, the jury were told that in considering the plaintiff's claim they were "to consider the amended claim only;" and by the third instruction they were told that the defendant admitted "the validity of this claim" and that their duties were "confined to a finding as to the value of the services" of plaintiff "in dollars and cents." From these instructions the jury might well understand that the agreement made by the plaintiff to settle her claim for $5,000 was not to be "considered," since it had no reference whatever to the amended claim. Moreover, the evidence does not show that the executor admitted "the validity" of the amended claim. It does show that he admitted that the plaintiff was "a good, conscientious person," who faithfully performed all the domestic services she claimed to have performed; but this is far from an admission that her amended claim was a "valid" claim. Throughout the case the executor insisted that the first claim was the only claim that had any validity and that it was settled by the agreement of the parties. Moreover, the amended claim contains an item of $600 for services performed in selling a patent. There is no evidence whatever that the plaintiff had anything to do with the sale of the patent, and there is nothing in the record to show that the executor made any admission of the validity of that item.

Several of plaintiff's instructions direct a verdict for the plaintiff if the jury believe from the evidence that the testatrix promised to pay the plaintiff $10,000 for her services. This action, although tried de novo in the Circuit Court, is, nevertheless, based solely upon the claims made and filed in the Probate Court; and neither of the claims so filed mentions any alleged promise of the testatrix to pay any such sum. Both claims are itemized on the basis of a quantum meruit for the services mentioned, and there is no claim upon any special or express contract to pay $10,000. While it is true that no formal pleadings are required in cases of this character, yet a claimant, either in the Probate or in the Circuit Court on appeal, cannot be permitted to file a claim against an estate based upon the reasonable value of services performed and then recover, without amendment, on proof of an express contract to pay a specific sum for such services, regardless of the reasonable value thereof. Such instructions should not have been given. The evidence regarding the alleged promises to "remember" the plaintiff to the extent of $10,000 in the will of the testatrix was admissible in the absence of any claim based upon such promise only for the purpose of showing there was an intention on the part of the testatrix to pay the plaintiff something more for her services than she had received and thereby furnish a basis for the allowance of a claim for the reasonable value of such services.

The executor offered an instruction, which the court refused, to the effect that if they believed from the evidence that the plaintiff made the settlement agreement above referred to and executed a lease for the homestead premises for one year, and that "owing to litigation the estate was not settled" before the end of that year, and that she then executed a new lease for another year at the same rental, and that she occupied the premises during the time covered by both such leases, then the

jury should find that plaintiff is not entitled to any more than $5,000, less $1800 for two years' rent, or the net sum of $3200. In lieu of so much of that instruction as was good and applicable to the facts, the court of its own motion gave an instruction telling the jury that if the jury believed from the evidence that on April 11, 1921, the plaintiff freely and voluntarily entered into a written agreement with the executor to adjust her claim, for the sum of $4100 in cash, payable at about the end of one year from that date, and that in addition thereto the plaintiff was to have the use of the home by lease for the period of one year, and in addition was to have the legacy and bequests mentioned in the will, then "the jury are instructed to find the issues for the claimant and assess her damages at the sum of $4100 with interest on said sum at the rate of five per cent per annum from April 11, 1922." Plaintiff's counsel does not contend in this court that this instruction was not a good instruction applicable to the facts of this case, and we have been unable to find any evidence in the record tending to prove that such agreement was not freely and voluntarily entered into by the plaintiff or that she was in any manner deceived or misled thereby. If the jury had followed this instruction, as they clearly should have done, the verdict would have been for a sum in the neighborhood of $4400. Without discussing in detail the evidence regarding the value of plaintiff's services, we may add that in our opinion the preponderance of the evidence does not justify a verdict of more than that amount, in any event. The court very properly, we think, instructed the jury that they had no right to take into consideration any lease or occupancy of the Buddington homestead from April, 1922, to 1923, for the reason that the rent for that period was covered by a separate agreement and belongs not to the executor, as such, but to the trustees of the Bible school, to whom the property was directed to be turned over by the terms of the will.

As we understand the evidence the trustees consented to the agreement of April 11, 1921, and authorized the executor to apply the first year's rent in part settlement of plaintiff's claim.

While the errors we have indicated are such as to require the judgment to be reversed, we are disposed to permit the parties to make an end of this controversy if they choose to do so, and therefore, if the plaintiff shall file in the office of the clerk of this court, within fifteen days from the date of the filing of this opinion, a remittitur of all of the judgment in excess of $4633 (which includes interest on $4100 at five per cent per annum from April 11, 1922), and if, within the same time, the executor shall file in the clerk's office an agreement to waive any error there may be in affirming the judgment for that amount, the judgment will be affirmed for $4633, otherwise the judgment will be reversed and the cause remanded for a new trial.

AFFIRMED IF REMITTITUR AND WAIVER BE FILED;
OTHERWISE REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

29219

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236 I.A. 624

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| CYNTHIA F. MUNNS, Appellee, vs. CHICAGO CITY RAILWAY CO. et al., (Defendants). CHARLES N. THOMAS, Appellant. | APPEAL FROM SUPERIOR COURT, COOK COUNTY. |

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is another appeal from the same judgment that is considered in the case of Munns v. Chicago City Railway Company et al., Gen. No. 29270, in which an opinion is handed down at the same time this opinion is filed. In such other appeal, the judgment was reversed and the cause remanded for errors affecting prejudicially the rights of the street railway companies, who were defendants; and since the judgment is a unit and is reversed and remanded in that case, it follows that the same order must be made in this case. Therefore, for the reasons stated in that opinion, and the further reason that the judgment is an entirety, the order in this case will be that the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

29258

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236 I.A. 624

DAVID LEVY et al.,
Appellees,

vs.

C. M. BANDUR et al., trading as The Bandur Motor Car Co.,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in forcible detainer for possession of a garage and automobile salesroom which defendants occupied under a lease made while the building was under construction.

The lease demises the premises for a term beginning March 1, 1923, and ending April 30, 1928, at a rental of $800 a month for the first two months, and $1200 a month thereafter, payable "in advance on the 15th day" of each month, with a proviso that if the premises shall not be "ready for occupancy" before March 15, 1923, then lessees may take possession at any time when the premises are "ready for occupancy," and in such case "the payment of rent * * * shall commence on the 15th day of the month following the day the said premises become ready for occupancy." The term "ready for occupancy" is defined by the lease as follows: "It is understood that said premises will be ready for occupancy when the painting is completed and steam and hot water is provided for and electric lights are installed."

The lease further requires the lessees to deposit with the lessors the sum of $2500 in specified installments, which sum is to be retained by the lessors "as an evidence of

good faith on the part of the lessees for the full term of this lease," and which, with accumulated interest at the rate of seven per cent per annum, is to be applied by the lessors "for the last months of the term herein created," provided the lessees shall have performed all the covenants and conditions of the lease; but if the lessees should fail to do so, "or to permit a breach of any of the said covenants or conditions," then lessors are to retain such deposit "or any part of said sum still remaining unused as rent by said lessees," as liquidated damages for such breach or violation.

It appears from the evidence that the building so leased was not fully completed until about August 1, 1923. The plaintiffs' evidence tends to prove that defendants moved into the premises on that day. One of the defendants testified that the first automobiles were moved in on August 11, 1923. On that day, or a week later, a payment of $1500 was made, of which it was understood that $980 was for the first month's rent and the remainder was an installment of the $2500 required by the lease to be deposited as security. At the time this payment was made, a typewritten memorandum, prepared by the defendants was presented to plaintiffs' for their signatures, reciting such payment and specifying a number of changes and additions to be made within thirty days. All the parties, both plaintiffs and defendants, met in the building in question at that time where these matters were discussed. Many of the typewritten paragraphs in the list were crossed out with pen and ink by the plaintiffs' attorney, then present, who also wrote into the memorandum a statement to the effect that $900 of the amount then paid was to apply as rental of the premises "from August 15th, 1923, to and including September 14th, 1923." There were several copies of this memorandum, and

those which were retained by the lessors contained the interlineation quoted. One copy, signed by one of the plaintiffs and retained by the lessees, did not contain this interlineation.

The controversy between the parties turns upon the question whether, under the terms of the lease and the acts of the parties above stated, the $900 paid in August, 1923, was due and payable on August 15, 1923, or was due September 15, 1923. Plaintiffs claim the building was not only "ready for occupancy," as that term is used in the lease, but was in fact occupied by defendants before August 15, 1923, while the defendants claim it was not "ready for occupancy" until about a month later. Upon this issue there was a jury trial and much conflicting evidence. After a study of the evidence contained in the record, we are unable to say that the verdict of the jury in favor of the plaintiffs is manifestly against the weight of the evidence. Plaintiffs' theory is well supported by the evidence, while the defendants' theory is not. Defendants' theory rests in large part upon the agreement dated August 11, 1924, but the work therein specified appears to be additional work, not included in the original contract, apparently coaxed or exacted from the plaintiffs in return for the prompt payment of the rent then due and payable.

It is contended that because plaintiffs had on deposit under the terms of the lease sufficient of defendants' money to pay two months' rent there could be no default until the deposit was exhausted. We think this contention is without merit. It does not clearly appear just how much was in fact so deposited by defendants. But if it be assumed that the deposit was sufficient to pay the second month's rent if applied to that purpose, such an application of the deposit would be contrary to the express terms of the lease regarding the same. It was to be retained as security for the payment of the rent "for the last months of the term," which was for

five years. If plaintiffs could be required to apply it upon a default in the payment of the rent for the second or third month of the term, then there could be no breach on account of the non-payment of such rent so long as the deposit was sufficient to cover the amount then due; and if the deposit should be thus applied then it could not be retained by the lessors "for the full term of the lease," nor applied to the payment of "the last months" of such term, as the lease requires. Such a construction of the provision in question would defeat the purpose of the required deposit and the intention of the parties, as shown by the language of such provision. Whether the amount so deposited may be retained by the lessors "as liquidated damages" is a question not presented by this appeal, and is not decided.

Defendants' counsel further contend that the remarks of plaintiffs' counsel during the trial were prejudicial. The remarks quoted in the briefs were highly improper, and plaintiffs' counsel was very properly sharply reproved by the trial judge for making them. But we are unable to see how such remarks could prejudice the defendants' case. They would naturally tend to hurt the plaintiffs' case rather than that of the defendants.

Finding no reversible error in the record, the judgment is affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

29305

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236 I.A. 624

NICHOLAS TRIPHAN, Guardian
of the estate of SYBIL TRIPHAN,
a minor,
Appellee,

vs.

PEOPLES FUEL SUPPLY COMPANY,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $35,000 obtained by plaintiff as the guardian of Sybil Triphan, a minor, for personal injuries sustained by said minor when she was run over by a heavy motor truck operated by a servant of the defendant.

The accident happened on Sunday, September 3, 1922, about 6:30 P. M., at the corner of 63rd and May streets, Chicago. 63rd street runs east and west and is a closely built-up business street sixty-six feet in width, upon which there is a double line of street car tracks. May street runs north and south, crossing 63rd street, and is also sixty-six feet in width. The roadway of 63rd street between the curbstones is forty-two feet in width. The roadway on May street at the crosswalk on the north side of 63rd street is thirty-six feet wide. Plaintiff's ward, in company with four other girls, all about sixteen years of age, was walking west on the north side of 63rd street and crossing May street. A few moments before the accident one of defendant's drivers, operating a five-ton ice cream truck twenty-five feet in length, was going east on 63rd street at a speed of at least twelve miles an hour. Several of the witnesses say it was going much faster. The driver testified he was going twelve miles an hour.

The evidence on behalf of the plaintiff tends to prove

that when the five girls, walking arm in arm, started across May street, plaintiff's ward saw defendant's truck coming east in the street car tracks on 63rd street about 250 feet west of May street; that when they reached the middle of the crossing, she and two of the other girls saw the truck about a hundred feet west of the west line of May street; that they saw and heard nothing to indicate any intention on the part of defendant's driver to turn north into May street; that they walked along as before and when they were nearly over the crossing and close to the west curb of May street, defendant's driver, without changing his speed or giving any warning whatever, turned his truck into May street, passing within a foot or two of the northwest corner curbstone, and that some part of the left side of the truck struck the plaintiff's ward, who was nearest to it, and she was thrown to the pavement, and the left rear wheel passed over her right leg, crushing it so as to necessitate the subsequent amputation of the limb above the knee.

The evidence on behalf of defendant tends to prove that defendant's driver sounded the whistle on the truck at a point more than one hundred feet west of May street; that the truck was not turned to the north until the front of it had reached the middle of the intersection; that the driver saw the five girls crossing May street and slowed down to five miles an hour or less to let them pass in front of him, which they did; that they were "cutting up" and "giggling," and paying no attention to their surroundings; that they were slow in passing ahead of the truck, whereupon the driver told them to "hurry up," at which "one of the girls stuck out her tongue," and the driver said: "Come on, we're in a hurry," and started the truck forward, when he heard a scream and applied his brakes at once.

There is also evidence tending to prove that at the time of the trial, over a year after the accident, plaintiff's

ward was suffering from nervousness and that there was a small sinus in the injured limb.

The declaration consists of six counts, of which the first five charge negligence in the operation of the truck, and the sixth alleges reckless, wilful and wanton operation. At the close of all the evidence, a motion was made to instruct the jury to find the defendant not guilty as charged in the sixth count. This motion was denied and the instruction offered with it was refused. Defendant contends that the court erred in denying this motion and refusing to give the instruction. After careful study of the evidence in the record, we think it can not be held that there is no evidence fairly tending to prove that the accident and consequent injury to the plaintiff's ward was caused by the reckless and wanton manner in which defendant's truck was operated, as alleged in the sixth count. We find that there is evidence to that effect which, if believed by the jury, would justify a verdict of guilty upon that count, and therefore it was not error to deny the motion and refuse the instruction. Some of such evidence is as follows:

Of the eight occurrence witnesses who were called by plaintiff, all but one testified that defendant's driver gave no warning of his approach or his intention to turn the corner as he did. The single exception is a witness who testified he was walking east on the north side of 63rd street, eighteen or twenty feet from May street, when he heard a siren whistle a hundred feet behind him and turned and saw defendant's truck coming rapidly east on the street car tracks of 63rd street. But this witness also testified that he stood and looked at the truck while it passed him and turned the corner, that he did not hear the driver give any other whistle or see any other signal at any time, that the truck began to turn towards the north when it was "alongside" of the witness on 63rd street, and that

it turned the corner into Bay street very close to the northwest corner curbstone at a speed of ten miles an hour. Defendant's driver testified that he was usually through with his route on Sunday about 4:30 or 5 o'clock, and was then over an hour late. The driver's brother, who was sitting on the seat of the truck at the time of the accident, testified that the driver told the five girls to hurry up; and one of the plaintiff's witnesses testified that the driver shouted to the girls to "get out of the way" as he made the turn. If these facts are true, defendant's driver was not only wilfully violating those sections of the Motor Vehicle act which require a left turn at a street intersection to be made beyond the middle of the intersection, at a speed not exceeding eight miles an hour, but he exhibited a reckless disregard of the consequences of such violations. Such conduct falls within the accepted definitions of wilful and wanton misconduct.

The other contentions of defendant, with one exception, assume that there was error in refusing to instruct the jury to disregard the sixth count, and therefore need not be further considered. The one remaining is that the verdict is so large as to indicate that the jury were influenced by passion or prejudice rather than the evidence of the injuries to plaintiff's ward. At the time of the accident, plaintiff's ward was an office girl in a mail-order house. She had been doing that kind of work for two years. Her physician testified that aside from her nervous condition (of which he said there were no objective signs) and the loss of her limb, she was in normal health at the time of the trial. If, therefore, all possible allowances be made for such damages as a jury may properly assess in a case of this character, we are unable to see how a verdict for so large an amount can be sustained. It seems reasonably clear that the amount awarded was the result of sympathy or passion, or both, on the

part of the jury. Where such is the fact, the error can not be cured by a remittitur.

For the reason last stated, the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

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236 I.A. 625

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| WILLIAM A. ARNDT, a minor, by William J. Arndt, his next friend, Appellee, vs. JOHN BENNAN and HERBERT S. RAY, Appellants. | APPEAL FROM CIRCUIT COURT, COOK COUNTY. |

MR. PRESIDING JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $5000 in favor of the plaintiff, a minor six years old, for damages for personal injuries sustained as the result of a collision between defendants' automobiles.

The accident happened on July 30, 1921, at the intersection of 57th street and Drexel avenue, Chicago. The defendant Ray was driving his sedan south in Drexel avenue and the defendant Bennan was driving his seven passenger touring car west in 57th street. There is evidence tending to prove that both cars were going at a high rate of speed; that they reached the intersection about the same time; that defendant Ray swerved his car to the right and defendant Bennan swerved his to the left, and the cars came together, about the middle of the intersection, with a crash that the witnesses say could be heard a block away; that Bennan's car stepped thirty or forty feet south in Drexel avenue while Ray's car ran into and over the curbstone at the southwest corner and struck the plaintiff, who was playing on the sidewalk three or four feet from the curbstone. Plaintiff sustained a complete oblique fracture of the left femur. He was taken to a hospital, where an anesthetic was administered and a leg splint and weights were applied to bring the broken ends of the bone together and hold them there. This method not proving adequate to produce the

desired result, another anesthetic was administered the next day and a Lane plate was inserted at the point of the fracture to keep the ends of the broken bone together. This plate and four screws are still in the boy's leg, and there is evidence to the effect that up to the time of the trial, more than two years after the accident, plaintiff frequently suffered from severe pains in the injured limb, and that while he does not limp, one of his legs is an inch longer than the other.

In this court, each of the defendants contends that he was guilty of no negligence. Counsel for the defendant Ray insists that the preponderance of the evidence shows that he had the right of way and therefore was entitled to assume that the defendant Bennan "would respect his right." Counsel for defendant Bennan contend that the evidence shows that he was fifteen feet within the intersection when the defendant Ray was fifty or sixty feet to the north of it, and therefore the latter did not have the right of way. The jury found both were guilty of negligence, and, after reading the evidence contained in the abstract, we think the jury were justified in their finding. The evidence of the only disinterested witnesses to the accident is to the effect that both defendants were driving at such unreasonable rates of speed that a collision was inevitable and that the injury to the plaintiff was the result, regardless of the question whether Ray or Bennan, as between themselves, had the statutory right of way.

The defendant Bennan insists that it was error to give an instruction telling the jury that the statutes of this state provide that all vehicles traveling upon public highways shall give the right of way to vehicles approaching upon intersecting highways from the right and shall have the right of way over those approaching from the left. This is substantially in the language of the statute, and in view of the contradictory statements of the

defendants, it was not error to give it.

It is also contended that the court erred in giving an instruction on behalf of the plaintiff to the effect that while the law permits a defendant to testify in his own behalf, yet the jury have a right, in weighing his testimony, "to take into consideration that he is a defendant and his interest in the result of the suit." The objection made to this instruction is that it improperly singles out the defendants in applying the rule as to the interest of a witness. While the plaintiff was called as a witness, he testified to nothing that was disputed or contradicted by either of the defendants. The objection made, therefore, lacks force in this instance. Moreover, the jury were instructed to treat the instructions as a series and apply them to the facts as a whole; and the court gave another instruction applicable to all witnesses alike, to the effect that the jury may take into consideration the interest of any witness appearing from the evidence, in determining the credit to which the testimony of such witness is entitled.

It is next claimed that the court erred in refusing to require the plaintiff over the objection of plaintiff's counsel, to submit to a physical examination upon the trial, although the plaintiff's next friend - the boy's father - had expressed his willingness to have such examination made. There was no error in the ruling. If the court has no power to compel an adult plaintiff in a personal injury case to submit to such a physical examination against his will, as was held in Peoria, Decatur & Evansville Ry. v. Rice, 144 Ill. 227, and Sroneskevitch v. C. & A. Ry. Co., 232 Ill. 136, 139, it certainly has not the power to compel a minor, over the objection of his counsel, to submit to such an examination. The defendants had whatever benefit there may be in using before the jury the objection of plaintiff's counsel as amounting to a refusal on plaintiff's part to submit to such an examination.

Moreover, the record shows that plaintiff's attorney offered to exhibit the plaintiff's injuries to the jury at an earlier stage of the trial and because of defendants' objections, it was not permitted.

It is next contended that there was error in the admission of evidence. The first alleged error has reference to the effect of permitting the Lane plate to remain in the plaintiff's leg. The doctor who put it there testified that it was "a foreign body" and would have "a tendency to become an irritant" to the surrounding tissues if it remained there. The court refused to strike out this statement, on defendants' motion. The record shows, however, that later another doctor, called by defendants to contradict this statement volunteered the statement that "this Lane plate ought to come out * * because it is not doing any good," and to this statement there appears to have been no objection. Since the doctors for both sides agreed on this point, we think the error, if any, was not prejudicial. The other question objected to was a hypothetical question, which, with the answer thereto, was proper where, as here, the evidence as to the fact and manner of the accident is not disputed. (City of Chicago v. Didier, 227 Ill. 571.)

It is finally contended that the damages allowed are excessive. We think there is no merit in this contention. From the undisputed testimony, the plaintiff has suffered intense pain, and still suffers in bad weather to an extent which keeps him in bed for days at a time. He was out of school for the better part of a year. He has had two operations and will be obliged to submit to another before he will regain the normal health he had prior to the accident. The amount allowed does not exceed the amount approved in many similar cases, and in view of the well known fact that the cost of living has increased very

materially in recent years, we think we could not be justified in disturbing the verdict of the jury.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

24335

136 - 29325

FREDERICK W. LINCOLN,
JOHN R. BRADLEE and
CHARLES E. BERRY, as
Henry W. Peabody & Co.,
Appellants,

vs.

CHARLES N. WYATT &
A. RIDGWAY WYATT,
trading as Wyatt Brothers,
Appellees.

236 I.A. 625
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for defendants entered upon a directed verdict in their favor in a suit in which plaintiffs claimed damages of $2,512.31 for alleged breach of contract.

The action is predicated upon an alleged contract between the parties for the sale of 400 cases of cocoanuts by plaintiffs to defendants, and the latter's refusal to accept the same.

The affidavit of merits denies the essential allegations in the statement of claim and alleges in effect that plaintiffs, through a brokerage firm tendered a contract in the form of that relied upon by plaintiffs, but that it was not accepted in that form but was accepted as modified and changed in a separate paper of same date as to place of delivery and time of shipments, in respect to which plaintiffs failed to perform.

Appellants complain of the court's rulings, mainly upon the admissibility of documents constituting the contract as claimed by plaintiffs, and of a letter tending to show defendants' refusal to perform.

The abstract is so incomplete and inadequate that to determine the correctness of the court's rulings requires us to go to the record itself. This fact alone would under a long

established practice justify affirmance of the judgment. But that no injustice may be done we have consulted the record, from which it appears that the contract of sale was prepared in triplicate, one copy to be retained by the seller, one by the buyer and one by the broker, the seller and buyer signing the copy retained by the other. Plaintiffs offered in evidence their copy bearing defendants' signature. But the cross examination revealed that the document was presented to defendants by plaintiffs' broker and not signed by them until modified by a separate paper of the same date that was prepared, signed and delivered by said broker through whom the contract was negotiated. It thus appearing by plaintiffs' own witness that the offered document constituted only part of the contract between the parties, the court refused to receive it in evidence unless plaintiffs offered the other part. Plaintiffs took exception to the court's ruling saying it would constitute a variance but offered the other document under protest. In view of the protest the court refused to receive the same. Thereupon plaintiffs moved for judgment on the affidavit of merits, which the court denied as plaintiffs were not entitled thereto on the issues formed without adequate proof. The court then requested plaintiffs to proceed with their case. This they refused to do, their counsel saying they would stand on the offer they had made. Thereupon the court directed a verdict for defendants.

It is unnecessary to consider whether the court was correct in all its rulings on admission of testimony and in refusing the offer made. Assuming that the tendered proof would show a contract and a refusal by defendants to perform the same, yet without proof of damages resulting from the breach plaintiffs would not be entitled to a judgment. They made no attempt to prove damages which were expressly denied by the affidavit of merits.

A party cannot try his case piecemeal, and then ask to have it reviewed for error as far as he has gone even though it would entitle him to a new trial had he presented a complete case. He must at least make, or offer to make, a *prima facie* case. That was not done in the case at bar. There is nothing left to do but affirm the judgment.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

29274

185 - 29274

GILL GLASS COMPANY, Inc.,
Appellee,

vs.

SOLAR ELECTRIC COMPANY,
Appellant.

# 236 I.A. 625

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action to recover the price for glass globes or canteens which plaintiff furnished to defendant upon written orders therefor. No question arises as to their delivery or as to the correctness of credits allowed.

Appellant's first point is that a verdict for $3363.84 is inconsistent with plaintiff's theory of the case because it is $373.76 less than the undisputed sale price of the merchandise in question. Appellant can not be heard to object because the judgment entered here was for too small a sum. (Becker v. People, 164 Ill. 267, 273.) It has been frequently held that an assessment of damages against one at less than the amount claimed is not an error of which he can complain. (Casey v. Vandeventer, 76 Ill. App. 628; Florsheim v. Bullasham, 58 id. 575; Hadenberg v. Graham, 69 id. 142.)

Plaintiff's claim is based upon three separate orders calling for a certain number of globes at specified prices, dated May 12, June 30, and Aug. 8, 1921, respectively. One of the main issues was whether the globes received were of the kind and quality ordered, and whether defendant was entitled to credit for such as were defective. After the globes were received defendant put them through a process which consisted of placing a certain substance resembling glue on the globes in which lettering and designs were carved by hand, and the design and lettering were

then ground into the glass by a method of forcing sand under high pressure against the globes. This process resulted in the breakage of a considerable percentage of the globes, for which defendant sought and claims credit. The claim is based mainly on an interview had between defendant's secretary, Rice, and plaintiff's president, Gill. Pursuant to defendant's alleged understanding of the same it sent plaintiff a bill for $777.83 for breakage of globes delivered on the first order, which plaintiff refused to recognize.

We shall first refer to rulings on evidence complained of.

Plaintiff's attorney having brought out in examination that no other bill for breakage than that mentioned was ever sent to defendant, it is urged that because the controversy over the right to credit resulted in this law suit and arose before the actual amount of breakage in the second car had been determined, it was error for the court not to admit in evidence correspondence subsequently had between appellant's attorney and appellee which might explain why no other bills for breakage were sent. As the correspondence contained matters pertaining to a settlement or compromise of the differences between the parties, and no admission of liability can be predicated upon an offer made by way of compromise, and no direct admission of liability is otherwise pointed out there was no error in excluding the correspondence.

Plaintiff having called defendant's secretary, Rice, to the witness stand under section 33 of the Municipal Court act, it is urged that an examination of him upon matters of defense was improper. It is not proper practice to anticipate a defense. But as defendant was permitted to cross examine the witness with reference to such matters we fail to see how it was in any way

damaged or prejudiced.

It is also urged that because plaintiff questioned the witness Rice respecting his interview with Gill in Philadelphia, and did not expressly elect not to be bound by his testimony, it was error to permit him to call Gill to give a different version of the interview. While we do not understand that one calling a witness under said section must expressly make an election whether he will rely upon his testimony, yet it appears plaintiff expressly disclaimed his intention to be bound by his testimony, and defendant insisted upon, and was given, the right to cross examine the witness. We are cited to nothing in the statute or recognized practice which precludes a plaintiff from rebutting the testimony of a witness called under section 13, whose testimony he does not choose to adopt.

Defendant called a salesman of the Phoenix Glass Company, of which it had bought glass, to prove that it was the custom of that company and other glass manufacturers to make an allowance for breakage. In rebuttal plaintiff, over objection, showed contrary to such witness' testimony that there was printed on the bill heads of said company the words: "No allowance for breakage." We think there was no error in overruling the objection.

Claiming that it had the affirmative of proving that the globes were not of the kind and quality ordered or suitable for the purpose for which they were intended, appellant urges that the court erred in not giving it the right to make the opening and closing statements to the jury. While granting such right upon such a contention is generally a matter of discretion left to the trial judge, if a fair trial has otherwise been had upon the merits of the case and on proper instructions a reversal will not be allowed for such a slight error in practice. (Carpenter et al. v. First National Bank, 119 Ill. 352, 357; Kells v. Davis, 57 id. 261.)

Nor can we agree with the contentions that there should have been a directed verdict for defendant or that the verdict was contrary to the weight of the evidence. It is undisputed that the defendant made the orders in question at the prices agreed upon. Its defense was that the goods were not of the kind and quality ordered, that the globes were either too light to stand such process or the glass was so thin in places or unevenly distributed as to result in breakage under such process, and that such fact could not be ascertained until the globes were put through the process, and that it resulted in a large amount of breakage, loss of labor and material expended thereon. Defendant also pleaded a loss of profits consequent upon plaintiff's failure to deliver all the globes ordered before it shut down its plant, and that it did not accept the globes delivered on the last order, and it claimed a set-off covering these various items.

Defendant claims that an understanding was reached at said interview whereby defendant would be given allowances for such breakage. The versions of the witnesses Rice and Gill as to that interview are decidedly variant. The jury evidently accepted Gill's version to the effect that if the globes were too light defendant should set them aside and return them at plaintiff's expense, but should not go ahead using them and causing breakage in the process, and then expect plaintiff to make good the loss and expense.

It does not appear that the quality of these globes as to weight or thickness was designated in the orders or that plaintiff warranted that they would stand the process to which defendant subjected them. Said interview was in June before the entire first car had been used. The bill for breakage appears to have been sent some time in July. In plaintiff's reply it expresses surprise at the charge and referred to Gill's version of the understanding and the

fact that it had received no instructions respecting the weight of the globes. Notwithstanding plaintiff's refusal to recognize the claim for breakage defendant continued to receive the globes sent it and to subject them to such process and further breakage. In view of plaintiff's attitude and in the absence of any warranty of the goods or specifications as to their weight or thickness, we think defendant continued to do so at its own risk. In one of defendant's letters it said: "If it had not been that we needed the globes so badly you certainly would have had the whole car returned." And it admittedly used globes sent under the second order when it knew they were unsatisfactory. While defendant wrote that globes under the third order were unsatisfactory and would not be accepted unless an allowance was made for breakage and cost of labor on them in case of breakage, it nevertheless did not return or tender them back.

In answering plaintiff's inquiry why defendant "put through all the globes shipped" it said it was the only thing it could possibly do because "we had our customers hounding us to death for shipment which we could only make with your glass, and inasmuch as these globes were all light, there was no chance to call them out." This letter could indicate that no effort was made on defendant's part to minimize plaintiff's loss, as it unquestionably should have done, but that defendant continued to use the globes at a greater loss from breakage than if it had returned them to plaintiff after finding the percentage of breakage was so great, and required plaintiff to stand the loss of cartage, freight, etc.

It appears that plaintiff was at all times ready and willing to give defendant credit for any globes that might be returned. There was also evidence tending to show that by proper testing, either in lifting or using lights in the globes, defendant could have determined whether a large percentage of them would stand the process

of sand-blasting.

It is claimed that the failure of plaintiff to fill its orders before it shut down its works for the summer occasioned a shut-down of defendant's factory and consequent loss of profits. Not only did defendant have timely notice of plaintiff's intention to shut down and was requested for that reason to put in its orders in due time, but there was no proof that defendant was not able to purchase globes elsewhere and save the necessity of closing its works, or that plaintiff had reason to know its failure to send the globes would occasion defendant's shut-down. While perhaps juries might differ as to whether defendant was entitled to a set-off we are not prepared to say that the evidence does not justify the verdict.

As to the instructions: While they were oral and somewhat informal and inartistically stated we fail to find any such error as would justify a reversal. The judgment will be affirmed.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

207 - 29296

236 I.A. 625

CITY OF CHICAGO,
Appellee,

vs.

LAFTONY ELLIOTT,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant was tried before the court without a jury upon a complaint charging him with a breach of the peace and conduct tending thereto, in violation of a certain section of the Municipal Code of Chicago. He was found guilty and fined $250 and costs, and appeals from the refusal of the court to grant a new trial or arrest the judgment.

The points of the appeal are untenable. The first, as to the claim of insufficiency of the "information," and the second, as to the failure of the record to show an arraignment and plea, are made under the misconception that this was a criminal charge instead of a civil suit. A suit to recover a penalty for a violation of an ordinance is a civil suit, to which rules governing criminal procedure do not apply. (City of Chicago v. Williams, 254 Ill. 360; City of Chicago v. Kunkel, 232 Ill.112.)

If the complaint was not sufficient to apprize appellant, as he claims, of the particular respect of the violation he could have demanded a bill of particulars. While the Municipal Court could take judicial notice of the contents of an ordinance upon which the complaint rested under section 54 of the Municipal Court Act, we cannot unless it is certified to us as a part of the record, which has not been done in the instant case. We must assume, therefore, that it was a case properly brought under the ordinance declared upon, and that

appellant could have had a bill of particulars had he asked for one.

Appellant also urges that the finding is against the weight of the evidence, and that a new trial should have been granted on the ground of newly discovered evidence. We think there is no merit to either contention. Appellant was arrested in one of the large retail stores of this city by a detective who testified to observing him "bumping into women and rubbing against them," after receiving several complaints as to his conduct. Defendant admitted that he was taken to an office in the building and told of the charge against him. The officer who arrested him also said he offered him money to let him go, and this was confirmed by another officer. While defendant denied the charge and that he offered money to be released the evidence was sufficient to sustain the charge if believed by the court.

The claim of newly discovered evidence was contained in the motion for a new trial made by the attorney and was not presented in the form of an affidavit. The fact that the motion was not supported by an affidavit or other competent proof was sufficient ground for denying it. (Ency. Pl. & Pr., Vol. 14, p. 822; Hinchey v. West, 23 Ill. 329, 332.) As said in the latter case:

> "In an application for a new trial, because of newly discovered evidence, it is not sufficient for the party to state that he has been informed and believes that the witness will testify to the facts, but the truth of such facts must be verified by affidavit."

The facts set up as the basis of the claim relate to when the defendant was brought before said witnesses and not to the time when the officer claims to have observed his conduct. Not only are the facts set up in the request for a new trial insufficient to show that the testimony would be controlling but it does not show proper diligence to procure the attendance of such witnesses or that appellant asked for a continuance of the

case that he might produce them, as he probably would have done if surprised by the evidence against him.

The judgment is affirmed.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

29320

231 - 29320

236 I.A. 625

ARTHUR E. KISSELL,
Appellant,

vs.

BESSIE MAY KISSELL,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree dismissing for want of equity a bill seeking the annullment of the marriage contract, on the claim of defendant's insanity at the time it was entered into October 17, 1911.

It is appellant's contention that the sole question presented for review is the sufficiency of the testimony and evidence to sustain the bill. Appellee urges that not only was the decree justified from the point of view of the weight of the evidence adduced but that plaintiff's laches in bringing the suit under the circumstances is such as not to warrant application to a court of equity for assistance or relief. The principle urged is familiar, and we think a review of the facts calls for its application.

All of the evidence heard except that of complainant was in the form of depositions. Complainant's testimony was to the effect that he became acquainted with defendant in the year 1908. He was then living in Cincinnati, Ohio, and she in Parkersburg, West Virginia. He testified that he saw her only about half a dozen times before their marriage; that about half an hour before the marriage ceremony he was informed that the defendant had become ill and had sent for a doctor, but that everything would proceed at the appointed hour; that her appearance at the time of the ceremony "was extremely unnatural" and she was extremely nervous, and that she had to be "wedged in"

between himself and her sister to prevent her from falling during the ceremony, and the answers she was called upon to give were indistinct and mumbled; that immediately after the ceremony she was taken to her bedroom and he did not see her until the following day when they went to Cincinnati, where they stayed for two days with her married sister, and then went to a flat he had furnished for their home; that she was gloomy and her actions were abnormal, that while living there she threw a black tailored cloth suit in a canal and endeavored to burn a diamond brooch, giving as an explanation that he disliked black and she did not care for the diamonds; that physicians there diagnosed her case as dementia praecox; that she remained in Cincinnati on and off until March, 1913, during which period her conduct was irrational; that they went to West Virginia to live; that in July, 1914, she fired a revolver at him without provocation and was sent to the State Hospital for the Insane at Spencer, West Virginia, in August, 1914, where she has since been.

He gave as the reason for his delay in bringing the suit for annullment that he hoped the defendant would recover.

Two physicians, Dr. M. F. Griffin and Dr. George D. Jeffers, both of Parkersburg, West Virginia, testified by deposition to treating her at different times for insanity. Dr. Griffin testified that at times prior to her marriage she was insane, and that he prescribed for her once or twice after she was married; that he could not say that she was insane during the entire time he treated her but as she was married some little time before he knew of her marriage he did not know about the condition of her mind just at the time she was married; but at one time before she was married he did not believe she was capable of realizing what she was doing, and in his opinion was not able to contract a marriage at the time she did. He was

of the opinion that she was insane at times before she was married and treated her for nervousness and insanity quite a while before her marriage.

Dr. Jeffers testified that he also treated her for a "nervous condition, a mental defect - really insanity" several months after her marriage for about a year to a year and a half; that he was one of the physicians that pronounced her insane when she was sent to the insane asylum; that he first met her a short time before she was married and did not know her well enough prior to her marriage to express an opinion as to her mental condition, but judged from her condition after her marriage that she was not able to enter into a marriage contract October 17, 1911.

The testimony for defendant was also given in the form of depositions by her father, an aunt and a sister. The father testified that prior to her marriage she was in good health except that she became somewhat nervous from her studies after her graduation from a college of Maryland, where she received the degree of Bachelor of Arts in June, 1908, and was sent to Flint, Michigan, for treatment, and after remaining there a few months was discharged and returned home, where she remained until her marriage; that on account of her nervous condition he did not for a time consent to her marriage to complainant, and expressed the desire that the marriage should be deferred until she thoroughly regained her strength, but complainant said he had talked everything over with the daughter and was ready "to take her for better or for worse," and after talking the matter over with his daughter and wife the marriage was finally agreed upon. He asserted that prior to her marriage she had never been treated for any mental disorder or adjudged insane or displayed any symptoms of insanity;

that if Dr. Griffin treated her for insanity he never knew it, and in his opinion she was able to contract a marriage at the time of the ceremony, and to stand on her feet and answer the questions without assistance; that none of the doctors who treated her ever advised him that she was mentally defective or insane.

Her aunt, who stood up with her at the marriage ceremony, stated that she was in good mental and physical condition until a few days before her marriage when she was a little nervous, but that she observed nothing unusual as to her mental condition or acts at or before that time; that she was able to stand up and answer correctly the questions put to her at the ceremony; that she knew the doctor who had attended her, and the first time that she had ever heard anybody allege that she was of unsound mind was about two years after her marriage; that she came from the institution in Michigan perfectly well.

Her sister testified that she was present at the wedding as matron of honor; that defendant was perfectly all right in every way that she could observe; that defendant personally made all the preparations for the marriage, made the announcement, attended to all of her affairs, and seemed happy and cheerful on the night of the marriage and gave her answers clearly and acted perfectly normal; that she had been with defendant constantly all their lives except the four years she was at college, and almost every day for a year and a half before her marriage; that her health was always good until she overworked with her studies and became nervous; that after her return from college she was sent to Flint, Michigan, for several months' treatment, and from time to time afterwards received treatment from their family physicians for nervousness, but, as she claimed, "nothing serious;" that she never observed any abnormal mental condition prior to or at her marriage or

immediately after, and declared that she was absolutely normal; that she had an illegal operation sometime after her marriage and was never the same thereafter; that she observed mental abnormality after that time.

After a review of the evidence we are unable to say that the court was wrong in its conclusions. The parties lived together some three years after the marriage ceremony during which time, according to the testimony of her sister, who saw her daily, she performed her social and household duties without any suggestion of mental abnormality. She testified in effect that the marriage was not altogether a happy one but that there was no evidence of an abnormal mental condition until after the illegal operation. It is certain that no steps were taken by complainant prior to that time to have her treated for a mental condition. It is somewhat strange if she was mentally unsound at the time of the marriage ceremony he should not have discovered it and had her treated for it before the lapse of three years following their marriage, and should have delayed not only during that time but for the following nine years before bringing an action for the annulment of the contract. Nothing seems to have been said or suggested either at the time of the marriage or immediately before or after that she was not perfectly sane and normal at that time. All recognized her nervous condition, and it seems to have been fully discussed before the ceremony. It seems singular that the ceremony should have been permitted if any one connected with the family or knowing her intimately, entertained any idea that she was not sane at the time. We think the evidence wholly failed to show by preponderant proof that she was not capable of entering into a marriage contract at that time even if before or afterwards she showed symptoms of insanity.

Whether the case be considered from the facts as shown by the evidence or the laches of complainant in bringing his suit we think the court was justified in dismissing the bill for want of equity.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

234 - 29323

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|---|---|
| MARK MUNROE, Appellee, vs. CRANE COMPANY, a Corporation, Appellant. | 236 I.A. 626<br>APPEAL FROM SUPERIOR COURT OF COOK COUNTY. |

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action for malicious prosecution. Appellee was caused to be arrested and tried for larceny of some brass flanges by Mark L. Leonard, superintendent of one of the departments of the Crane Company, appellant. He was acquitted and brought this suit against said Leonard and Mike Hansen, another of appellant's employes, and appellant. At the close of the trial the case was dismissed as to Leonard and Hansen. From a verdict and judgment against defendant for $1,000 it has appealed.

We think the evidence fails to establish the two necessary elements of malice and want of probable cause, but clearly shows the contrary.

Plaintiff's case consisted of the evidence given by Leonard and himself. Leonard was called upon merely to testify that he swore out the warrant for plaintiff's arrest and that such action was within the line of his duty. Plaintiff testified that he was arrested, incarcerated, acquitted, was innocent, and suffered some damage. Aside from saying that Hansen, who reported the larceny, was not friendly to him and he had previously so told Leonard, there was practically nothing on which to predicate a claim of malice or justify the inference of it. His explanation of his possession of the alleged stolen flanges was quite as consistent with the theory of guilt as with his innocence.

The defense called its employes, Hansen and Barber, and said Leonard. The evidence was to the effect that flanges had been missing and a watch was set by Hansen, who had charge of the stock room, to discover who was taking them. Receiving a signal from a watcher he went up a ladder and looking over a cabinet about eight feet high saw plaintiff take flanges, and as he left the room stop and converse with said Barber. Hansen went over to them and tapping against the flanges concealed underneath plaintiff's bib and jumper, told him to put back the flanges where he got them, which Munroe did without saying anything. Hansen reported these facts to Linfoot, his superior and Leonard's assistant, who in turn reported the same to Leonard, as well as a conversation he had with Barber about the incident.

Barber testified that after Hansen told Munroe to take back the goods, the latter said to him later in the day: "Aint it hell; do you think Mike will squeal right away?" and that he on inquiry from Leonard reported to him what took place between Hansen and Munroe, substantially as told by Hansen, and what Munroe said to him later.

Leonard testified that seeing several flanges manufactured in his department in barrels of brass scrap purchased that morning from a junk man he had a conversation with Linfoot about it and was informed by the latter of what Barber and Hansen had told him as aforesaid; that he then had a talk with plaintiff, who said he took them to use on a workbench, for which the evidence shows they were not suitable, that plaintiff had no right to take flanges except for jobs he had under way, and then only when issued to him by the stock clerk, and that it was not within the scope of Munroe's duties to place issued material on his bench. Linfoot also told Leonard that another employe had stated to him that he saw plain-

tiff take the flanges out of the bin. This employe was not called to testify because his address could not be traced. Leonard did not talk personally to Hansen before ordering Munroe's arrest as he was out of the building, but acted upon these statements from Linfoot and Barber, whom he considered responsible and trustworthy.

The main question is whether the circumstances on which Leonard acted presented "such a state of facts, in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion that the person arrested is guilty. Bacon v. Towns et al., 4 Cush. 217. It does not depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution." (Harpham v. Whitney, 77 Ill. 32, 42.) It was said in Glenn v. Lawrence, 280 Ill., 581:

> "It is the belief held in good faith by the prosecutor in the guilt of the accused, based upon circumstances sufficiently strong to induce the belief in the mind of a reasonably cautious person that the defendant in the prosecution was guilty of the particular offense charged." (p. 587).

Not only did Leonard testify to his actual belief in plaintiff's guilt, but we think the circumstances upon which he acted were sufficiently strong to induce that belief in the mind of a reasonably cautious person, and were sufficient as a matter of law to constitute probable cause for commencing the proceeding. (Angels v. Paul, 85 Ill. 106; Wade v. Walden, 23 Ill. 369.)

It is not a question of what were the real facts but what were the facts brought to Leonard's attention upon which he acted. As said in Frank Farmelee Co. v. Griffin, 136 Ill. App. 307, "If he believed, and in good faith acted upon such information, he was acting not without probable cause." (p. 319). It would be a strange doctrine to hold that a person instituting a prosecution under such circumstances should be compelled to respond in damages. The action for malicious prosecution is not favored in law, and when

brought for the institution of criminal proceedings is viewed with disfavor as public policy favors the exposure of crime, which a recovery against a prosecutor tends to discourage. (18 R.C.L. p. 11; Israel v. Brooks, 23 Ill. 526; Frank Farmelee Co. v. Griffin, supra.)

As said in Anderson v. Friend, 71 Ill. 490:

> "That a party who is told, by those whom he has no cause to distrust, that a particular individual has done this or that thing, which is not, in itself, improbable, and which he does not know to be untrue, has probable cause for believing and acting on the information so received, is a proposition too self-evident to admit of argument; and the policy of the law will no more permit the individual who, in good faith, institutes a criminal prosecution upon information thus acquired, and which, addressed to a reasonable mind, would induce the belief of the guilt of the accused, to be mulcted in damages because of a failure to establish the guilt, on the trial, than it will because of the same result when he acts upon his own knowledge."

We think there can be no doubt from the evidence that Leonard, through whose actions it is sought to charge appellant, acted in good faith and had probable cause for belief in appellee's guilt.

We find nothing in the rulings on evidence or on the given or refused instructions that calls for reversal or special comment. The judgment, however, will be reversed for the reasons stated and the cause remanded.

REVERSED AND REMANDED.

Fitch, P. J., and Gridley, J., concur.

29345

256 - 29345

236 I.A. 626

THOMAS J. SWEENEY,
Appellee,

vs.

CITY OF CHICAGO et al.,
Appellants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order for a writ of mandamus entered after respondents elected to stand by their demurrer to the petition which we think was erroneously overruled.

It is the law of this State that a writ of mandamus will be awarded only in cases where the party applying therefor shows a clear right to it and clear neglect of duty on the part of defendant to perform the act sought to be enforced. (People v. Busse, 248 Ill. 11, 16; People v. City of Chicago, 280 Ill. 316.)

We think the petition is clearly defective in both respects. It is predicated upon the theory that there were vacancies in the office or position in the civil service of chief of battalion in the Fire Department of the City of Chicago which it was the duty of the Civil Service Commission to fill; that petitioner was entitled to be promoted, and that others lower on the eligible register for said position were given preference over him and therefore illegally certified and appointed to existing vacancies.

After alleging facts showing that petitioner was duly placed upon the eligible register August 3, 1914, the petition avers "that said register was not prior to December 29, 1920, cancelled or superseded or renewed; that names of other applicants were certified from said list and removed therefrom until on August 17, 1920, petitioner in his established order or rank was

second on said eligible register for promotion to battalion chief in said fire department; that since said date, on to-wit, April 5, 1923, the applicant or candidate who stood above your petitioner upon said list was duly appointed to one of the vacancies in the office of battalion chief; that from August 17, 1920, down to date there have at all times been one, and most of the time two, vacancies in said office; that on August 17, 1920, certain persons were certified from said register or list who were by said commission preferred and certified from said list, notwithstanding they were not at the top of said list but were below your petitioner in rank, but were certified under section 10½ of the Civil Service Law because the said candidates who were certified had been in the military or naval service of the United States; but your petitioner avers that said section 10½ was not retroactive and the appointment of said candidates in preference to your petitioner was illegal and of no effect."

The petitioner further avers that he has at various times demanded that he be certified to the Fire Marshal of Chicago to be appointed to one of the vacancies of battalion chief in said department but that "said persons" (unnamed) of lower rank or grade were appointed to said offices; that said offices were illegally filled; that he should have been certified when his name was regularly reached on said list; that the office was created by ordinances of the City of Chicago, and that a salary therefor has been appropriated from time to time, and prays for a writ of mandamus directing his certification and appointment and the payment to him of the salary for such position from July 1, 1922, - the significance of which date is not apparent.

The petition is manifestly based on petitioner's claim of illegal appointments made August 17, 1920, to a position or positions to which he claims he was entitled to be certified and

appointed. His petition was filed July 16, 1923. He has, therefore, delayed for nearly three years this attempt to assert his alleged rights. It was said in People v. Glenn, 215 Ill. 620:

> "The writ of mandamus is not a writ of right, and it was largely within the sound discretion of the trial court to refuse to issue it. When a writ of mandamus is asked the court may inquire whether it will operate impartially, create confusion and disorder, and whether it will or will not promote substantial justice. Courts, in the exercise of the discretion with which they are vested, may, in view of the consequences attendant on the issuing of a writ of mandamus, refuse the writ, though the petitioner has a clear legal right for which mandamus is a proper remedy. * * * The court may act on existing facts and view the case with reference to the consequences of its action * * * ."

Applying this rule in Kennally v. City of Chicago, 220 Ill. 485, where the petition set up a good cause of action for appointment to a position in the civil service, and the petitioner had waited five years before filing his petition for mandamus, it was held that the writ was properly denied for laches and because it would create confusion and disorder and great public inconvenience and might result in disarranging the public service.

In the instant case petitioner, with full knowledge of the facts above stated, has continued to remain in a rank below that to which he now after three years asserts the right to promotion and to the salary therefor. To permit a person already in the classified service to stand by for several years before asserting his claim to a higher position and the salary incident thereto, and then demand not only repayment of the salary by the city, but a readjustment of the persons involved in the different positions, is, we think, calculated to create such confusion, disorder and inconvenience in the public service that the court in the exercise of sound discretion should have refused the writ.

But the petition is also too uncertain and defective to warrant its issuance. Construing the pleading most strongly against the petitioner, as must be done under a familiar rule, it must be inferred that the eligible register upon which his name

was placed was cancelled December 29, 1920. Otherwise the averment that it was not cancelled before that time has no particular significance.

Nor is the allegation relevant or pertinent that on April 5, 1923, an applicant or candidate who stood above petitioner on "said list" was appointed to a vacancy in the office. Such appointment has no bearing on the alleged illegality of appointments from the list in 1920. Nor without an averment that the cancelled register was restored the list in 1923 cannot be presumed to be the same as that cancelled. In the absence of necessary averments it may be inferred that "said list" was no longer in existence and no valid appointment could be made therefrom.

The averment that section 10½ of the Civil Service Law was not retroactive seems superfluous. If persons were appointed thereunder in August, 1920, for aught that appears to the contrary they may have been examined and placed upon the eligible register after said section became effective in 1919, and may with the credit given under the statute of one per cent for each six months or fraction thereof while in the military or naval service, have been entitled to and given a higher percentage than petitioner.

Altogether we think the petition too uncertain and defective to authorize the issuance of the writ, and that petitioner was guilty of laches in asserting his rights, if any he had. Accordingly the judgment will be reversed for error in not sustaining the demurrer.

REVERSED.

Fitch, P. J., and Gridley, J., concur.

268 - 29357

236 I.A. 626

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|---|---|
| FRANK A. ZUFELT, Appellee, vs. A. N. ANDREWS & CO. et al., Appellants. | APPEAL FROM CIRCUIT COURT, COOK COUNTY. |

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for deceit and fraud in the sale to plaintiff of preferred and common stock of the Falls Motors Corporation and also of the Empire Tire & Rubber Corporation.

Issue was taken on various alleged false and fraudulent representations and the averments necessary to such cause of action. After plaintiff put in his evidence defendants rested without offering any evidence, and the trial resulted in a verdict and judgment of $4,675 against appellants.

The points they urge on this appeal are that the representations made, if false, are not sufficient to sustain the cause of action; that there was no proof of scienter, and no proof of the falsity of representations made by defendants as to present or past existing facts.

Appellants cite what is concedely settled law, and so need not be discussed, that in order to constitute fraud in law a representation must be an affirmance of fact and not a mere promise or expression of opinion or intention. (Keithley v. Mut. Life Ins. Co., 271 Ill. 584, 586.)

To many of the alleged false representations declared upon this principle is applicable and they are justly criticised as constituting or tantamount to a promise or an expression of opinion or intention. But we think there were among them re-

presentations of material existing and past facts and that there was undisputed evidence tending to show they were made and were false and known to be such when made, and that plaintiff was thereby induced to purchase the stock to his injury.

These statements were with reference to the value, dividends, earnings and the financial condition of the two corporations.

Inasmuch as there was no attempt to deny plaintiff's testimony the jury were justified in indulging every legitimate inference therefrom which tended to support material averments in the declaration.

It would expand this opinion beyond reasonable length to state in detail the evidence which we think justifies the verdict. Much of it is in the form of lengthy circulars, letters and reports, which furnish sufficient grounds for the inference that defendant company and its president had full knowledge of the financial condition and facts pertaining thereto of which they made repeated representations to plaintiff, either verbally or by correspondence, that were evidently false and known to be such when made by them.

We shall refer to a few of those representations and the evidence showing their falsity.

It was repeatedly represented that the market value of the preferred stock of these companies was $100 per share, and the common stock $10 per share, and that they were selling for such prices on the market, and it was upon the strength of such representations and others that plaintiff from time to time between September 22, 1916, and January 24, 1917, made purchases, aggregating $6,480, of shares both of common and preferred stock in said companies at what was falsely represented to be their reasonable and actual market value.

While ordinarily misstatements made by a vender of

property as to its cost or value, in the absence of any fiduciary relation between the parties or of special circumstances, afford no ground for voiding a sale, although false and made with a fraudulent intent, (Noetling v. Bright, 72 Ill. 390; Plummer v. Rigdon, 78 Ill. 222; Dillman v. Nadlehoffer, 119 Ill. 567,) yet as said in Cooley on Torts, p. 484:

> "There are some cases in which even a false assertion of an opinion will amount to fraud, the reason being that, under the circumstances, the other party had a right to rely upon it without bringing his own judgment to bear. Such is the case where one is purchasing goods the value of which can only be known to experts, and is relying upon the vender, who is a dealer in such goods, to give him accurate information concerning them."

We think it is apparent from the undisputed evidence that defendants intended that plaintiff should rely, and that he did rely, upon the knowledge they had and the information they furnished pertaining to the assets, financial condition, output and profits of said companies, and their superior knowledge of such facts, and where such statements are made with the intention that they shall be understood as statements of fact, and not as expressions of opinions, they will constitute fraud. (Bigger v. Mueller, 254 Ill. 315, and cases cited on p. 323.) We think there can be no question from the evidence in this record that false statements as to the value of said stocks and as to what the companies were doing or had done in the way of carrying out profitable contracts, were made by defendants, having superior means of knowledge, and were relied upon as a matter of fact and not opinion, and so constituted fraud and deceit as charged in the declaration. As said in Krankowski v. Knapp, 268 Ill. 185, 191:

> "Whenever a party states a matter which otherwise might be only an opinion, and does not state it as a mere expression of his own opinion but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such, then the statement clearly becomes an affirmation of fact and may be a fraudulent

representation. (2 Pomeroy's Eq. Jur. 3d. Ed. sec. 878; Crocker v. Manley, 164 Ill. 282, and cases cited.)"

We think the representations made in the record are of such a character. Not only did they pertain to the market value of the stocks which was shown to be less than half of what plaintiff paid for the same but the evidence tended to show that the representations were false as to the number of motors shipped by the motor company, and as to the actual earnings on the stocks purchased and the actual book value thereof.

It appears that defendants underwrote the issues of said stocks and had direct knowledge through their agents or otherwise of the actual conditions of the companies. Not only did they make representations that the market value of the stocks sold were $100 for preferred and $10 per share for common when it was selling on the market at $48 and $3, respectively, but they informed plaintiff that the Falls Motors Corporation was earning $1300 per day from the sale of motors when the auditor's reports made for them and at their request showed the earnings were no more than half of this amount. They also represented to the plaintiff that the Falls Motors Corporation had no bonds, notes or floating indebtedness when in fact it had outstanding demand notes amounting to $173,400. They represented that the net earnings of said corporation for four months ending April 29, 1916, were $40, 298.82 while the auditor's report showed the net income for that period to be $31,738.96; that the gross sales for that period amounted to $384,599.09, while the auditor's report shows them to have been $348,599.09; and that the Falls Motors Corporation was making 100 motors a day when it was making only 30.

It also appears that a balance sheet and preliminary report of the accounts of the Empire Tire & Rubber Corporation as on August 31, 1916, prepared by a firm of auditors, differs very materially from a "tentative balance sheet," prepared by defendants, a copy of which they sent to plaintiff representing

plaintiff

it to be a copy of the auditor's. The "tentative" sheet shows total assets $5,605,477.69, while the original shows $2,350,998.16, and $577,765.83 cash in the bank, while the original shows $52,391.73, and authorized capital stock $6,000,000, issued and outstanding $4,500,000 par value, while the original shows stock issued and outstanding, $927,770 par value.

Similar discrepancies appear in the auditor's report of the value of stocks of the Falls Motors Corporation. Their report of August 31, 1916, shows the net book value of that corporation to be $357,812.87 against which the company had stocks issued and outstanding of par value of $1,500,000 with a bank overdraft of $3,159.19.

Whether the case be viewed as one where a party is legally liable for recklessly making false representations of a matter where he has no knowledge for the fraudulent purpose of inducing another to rely on his statements and to make a contract of purchase to his prejudice (Miller v. John, 208 Ill. 173, 179,) or as a case where a person makes positive assertions concerning the subject matter of a sale, and is therefore bound to know their falsity (Huff v. Jarrett, 94 Ill. 475; Bardera v. Kattleman, 142 Ill. 96) or a case where there was a direct affirmation of facts known to be false when made for the purpose of inducing another to act upon them, we think there was sufficient evidence to justify the verdict.

It is contended by appellant that the parties were dealing at arm's length and that plaintiff could easily have acquired information respecting these companies which were doing business in the locality where he lived. But as said in Leonard v. Springer, 197 Ill. 533:

"The rule is, that a party guilty of fraudulent conduct, whereby he induces another to act, will not be allowed to impute negligence to the latter as against his own deliberate fraud. 'Even where parties are dealing at arm's length, if one of them makes to the other a positive statement, upon which the other acts (with the knowledge of the party making such statement) in confidence of its truth, and such statement is known to be false by the party making it, such conduct is fraudulent, and from it the party guilty of fraud can take no benefit.' Linington v. Strong, 107 Ill. 295."

But we do not think the parties were dealing at arm's length. The defendants knew and were informed that plaintiff was acting on their advice in regard to purchasing the stocks. They frequently declared to him that their principle businesswas service, and that it was always at the customer's disposal, and said in certain letters: "You now have the best securities which a man can hold, and I am pleased to know that I was the means of getting you to purchase them," and "I believe you have acted wisely in taking my advice."

But whether dealing at arm's length or not we think defendants' liability was clearly shown.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

277 - 29366

ANNA SCHOOR, a minor, etc.,
Appellee,

vs.

HELENA DUNDALOW HINZE,
Appellant.

236 I.A. 626

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action in case to recover damages for personal injuries sustained by plaintiff, a minor, from being struck by defendant's motor truck. The trial resulted in a verdict and judgment against defendant for $9,000.

As grounds of reversal it is urged that the damages were excessive and that a remark was made in the hearing of jurors that was prejudicial and calculated to increase them.

As to the latter point the record shows that an investigation made by the court revealed that the remark, which was not made during a session of the court, was not heard by any of the jurors, and there was no affirmative proof that it was. We think, therefore, that the court properly denied the motion to discharge the jury based upon a contrary supposition.

As appellant's liability is not questioned we need not review the evidence further than it has a bearing on whether the damages awarded were excessive.

The accident took place March 15, 1921, when the plaintiff, a little girl, was about twelve years and three months old. She was standing on the sidewalk looking through a window when from negligence in the operation of the truck, as alleged and not questioned here, it ran upon the sidewalk against the girl and its hub struck her in the calf of her legs. As the blood rushed from the wounds a bystander tied up her

legs and had her taken to a doctor, and from there to a hospital, where she remained nine weeks under treatment before removal to her home. In the subsequent November she was again taken to the hospital for an operation to lengthen the Achilles tendon in the right leg, where she was for about a month, remaining in bed for about half the time and part of the time in a wheel chair or walking on crutches. There is little controversy with respect to the nature and extent of her injuries. The calf muscle of her left leg was torn and lacerated and the two calf muscles of her right leg were entirely torn away from the bone and were hanging down. The wound was cleaned, the muscles sewed up. The skin on the left leg was placed back so that there was a fairly good union, and it has healed, leaving a scarred tissue about two and one-half inches in diameter. But the leg is normal in function and but little of the muscle was lost.

No bones were broken and the permanent injuries complained of are confined mainly to the right leg below the knee. In the first operation on the right leg the muscles were sewed up and skin was taken from the thigh and grafted to cover the raw area. The patient was in a shock after coming out of the anaesthetic for several hours in consequence of the loss of blood. She required visiting every day while in the hospital and a dressing of the knees for subsiding an infection which set in. The left leg healed up quite fast and when she went home there was a pretty fair union in the right leg, though it had sloughed considerably and left a cavity about two inches deep in the calf. The loss of muscle drew up and shortened the ligament called the tendon of Achilles, that comes from the heel bone so that an operation for lengthening the same in the right leg was a necessity, as the tension of the tendon became stronger and caused her intense pain and was resulting in ankylosis. The result of the operation therefor gave her a lengthening of one and one-quarter inches of the tendon so as to

Kopp and had her taken to a doctor, and then down to a hospital, where she remained some weeks under treatment before recovering to her home. In the meantime Dorothea she was again taken up for hospital for an operation to lengthen the contracted tendon in the right leg, where she was for about a month, remaining in bed for about half the time and part of the time in a wheel chair or walking on crutches. There is little controversy with respect to the nature and extent of her injuries. The only muscle of her left leg and torso and innervated was the hip-muscles of her right leg were entirely torn away from the bone and were hanging down. The wound was dressed, the muscles pulled up. The skin on the left leg was placed back on that there was a fairly good result, and it has healed, leaving a scarred stump about 7½ and one-half inches in diameter. But the leg is normal in function and has little of the muscle was lost.

In bones were broken and the pressures injuries caused about as are sustained usually in the right leg below the knee. In the first operation on the right leg the muscles were moved up and skin was taken from the thigh and grafted to cover the raw area. The grafting was in a short after coming out of the anesthetic for several hours in consequence of the loss of blood. The wounded healing every day while in the hospital and a dressing of the bones for unhealing on infection which set in. The left leg healed up quite fast and when she went home was a pretty fair stump in the right leg. Though it had changed considerably and left a nearly above the knee drop in the calf. The loss of muscle tissue and shortness the ligament called the tendon of Achilles, that comes from the back bone to that on operation for lengthening the stump in the right leg was a necessity, as the tension of the tendon became stronger and caused her intense pain and was resulting in malfunction. The results of the operation therefore gave her a lengthening of one and one-quarter inches of the tendon so as to

let her foot come back in position. The ligament cut in the operation was sewed together, as was the skin over it, and the ankle and foot put in a cast for about a month. The operation was under an anaesthetic and took about one-half an hour, and the cast another half. The patient visited the doctor for about a year, every other day after the cast was removed. The skin is quite tense where it was sewed in the operation for lengthening the tendon so that walking and using the leg cause the skin to crack, which it has done about a half dozen times since. The upper part of the calf is healed well and there is no sore except where the three little pieces of skin crack. This latter condition will require rest so that the skin will heal. The operation on the tendon had the desired effect of lengthening it so as to give her a very nearly normal position of the foot - enough so that her heel is about one and one-half inches from the floor when standing in her bare feet, and can be accommodated by a high shoe heel. She has lost some use of her leg, has to walk on the ball of her foot, when not accommodated by a higher heel of the shoe, and there is a certain stiffness from the ankle up. There remains the cavity about two inches deep to within half an inch of the bone. Her greatest present difficulty is in said stiffness and the shortness of the tendon.

It also appears that her right foot has not developed as has the left, resulting from interference of the circulatory and nerve function. There is sensation and function in the leg but the muscular strength of the leg and foot in walking is impaired because much of the muscle has been destroyed and that condition is permanent. She experienced much pain after the accident and during the treatment, and if she stands now on her right leg too long, or bumps it, it pains her. The skin of the calf of the right leg is healed up but the cut below to lengthen the tendon is still sore.

Since the accident she has skated and ridden a bicycle but claims that when she uses her leg in running and trying to skate she feels pains in the calf of her right leg and a burning sensation where the stitches were made. It appears also that shortly after the accident her hearing became affected and that one ear drum is ruptured, but the evidence does not satisfactorily disclose that that was a result of the accident.

To show that the verdict and judgment were excessive appellant has cited many cases from this and other jurisdictions decided between 1886 and 1918 where there was either a reversal or a remittitur required much below the amount of the instant judgment in cases of severer accidents requiring the amputation of a leg or a part thereof or an arm, and requiring a remittitur in similar cases where there was ankylosis and a shortening and weakening of the leg resulting from a fracture or otherwise, and where a judgment of less than half the amount of the present judgment was deemed a reasonable measure of compensatory damages for such injuries. Appellee deems these cases of little value because the depreciation of our currency, and the high cost of living since the world war render the intrinsic value of the money judgment very much less than when the cases so cited were decided. This is true. But regardless of these economic changes we cannot but think the judgment, when compared with judgments given for more serious injuries, is somewhat excessive. We cannot agree that there is anything in the record to show that it was brought about by passion or prejudice. It was more likely the result of sympathy. While there is no definite standard for ascertaining the compensation that should be allowed for injuries, yet we are disposed to think that there should be a remittitur in the instant case of at least $1500. If such a remittitur is made within ten days the judgment will be affirmed for $7500. Otherwise we think it should be reversed and the cause remanded.

AFFIRMED IF THERE IS A REMITTITUR TO $7500.

Fitch, P. J., and Gridley, J., concur.

29369

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THE TRUST COMPANY OF NEW JERSEY,
a Corporation,
Appellee,

vs.

THE MAMMOTH HATCHERY, Inc.,
Appellant.

236 I.A. 627

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit on a promissory note signed by defendant, and naming Fernando S. Mesa Company as payee, and by it endorsed. A judgment of $2000 was entered upon a directed verdict for plaintiff, and the main question is whether there was any evidence calling for submission of the case to a jury.

The statement of claim described the note, and alleged that plaintiff was the legal owner and holder thereof; that it was purchased for a valuable consideration before maturity, and protested for non-payment.

After striking several affidavits of merits the court permitted defendant to file an amended affidavit setting forth as defenses that the note was stolen from defendant; that the name of the payee was not in it then but was inserted by some unknown person and is a forgery; that defendant never had any knowledge of the payee or business dealings with it, and never authorized the delivery of the note to it or received value from it. The affidavit further alleged, "That this defendant has no knowledge as to whether or not this plaintiff received this note without notice of its infirmities nor is it alleged that said plaintiff received said note without notice in the said statement of claim. Therefore this defendant requires strict proof of the fact."

Evidently regarding this last averment as raising the issue whether plaintiff was a holder in due course without notice plaintiff amended its statement of claim by alleging that it purchased the note in good faith for a valuable consideration before maturity thereof without notice of any infirmity or defect in title of the person negotiating it, and by agreement the said affidavit of merits was permitted to stand as the affidavit to the amended statement.

Plaintiff introduced the note, the certificate of protest, computed the interest, and rested.

After defendant's motion for a directed verdict was over-ruled its president, F. A. Kamp, who signed the note for defendant, testified that pursuant to an arrangement for credit made with the Julian Trade Finance Corporation in New York, said note together with other notes of defendant aggregating $14,000, in which the name of the payee was left to be inserted, were sent to the Finance Corporation to be exchanged for $14,000 worth of notes of his selection, with an understanding that before the notes were to be used said Finance Corporation would assume responsibility for the payment of any notes given in exchange, that it refused to do so, and thereupon he demanded the return of the notes, and all but three of them were returned.

This testimony tended to show that the title of the person who negotiated the note was defective within the meaning of the Negotiable Instruments Law, and thus cast the burden on plaintiff to show it was the holder in due course. Section 55 of that law declares that "The title of a person who negotiates an instrument is defective within the meaning of this act when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." And section 59 provides that when it is shown that his title was defective "the burden is on the holder to

prove that he or some person under whom he claims acquired the title as a holder in due course." This oral proof of the delivery of defendant's notes upon condition, which was permissible (Hall v. McDonald, 308 Ill. 329), and of the negotiation of one of them in violation thereof tended to show a negotiation in breach of faith if not under such circumstances as amount to a fraud, and therefore a defective title in the person negotiating it, which put on plaintiff the burden it did not assume of proving that it was a holder in due course.

In Hall v. McDonald, supra, where notes were delivered as collateral and not intended to take effect as promissory notes but were to be held by the payee until maturity and then to be surrendered upon payment of moneys to be collected by the maker for the payee, it was held that to sell the notes under such circumstances before maturity and to put them in circulation as valid promissory notes was to negotiate them in breach of faith and under such circumstances as amount to a fraud, and rendered the title of the party so negotiating them defective within the meaning of said section 55, and that such a showing of defective title cast the burden upon the holder of the note to prove that he acquired the title thereto as a holder in due course.

But regardless of where the burden of proof lay and whether the evidence tended to show any other defense, there being evidence in the record tending to show that the title of the negotiator of the note was defective the court erred in not submitting the case to the jury upon that issue. While plaintiff contends that the failure of defendant directly to deny the averment in the amended statement of claim that plaintiff was a holder in due course is treated as an admission thereof under the rules of the Municipal

court, yet no question was raised as to the sufficiency of the affidavit of merits in that respect, and it is apparent that both parties treated the issue whether plaintiff was a holder in due course as in the case and had the full benefit of it as if it had been formally pleaded. (Lyons v. Kanter, 285 Ill. 336, 339.)

The court erred in directing a verdict for plaintiff and in not submitting the case to the jury, and the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Fitch, P. J., and Gridley, J., concur.

26391

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236 I.A. 627

MILKA MIRICH, a minor, by Nicholas Mirich, her next friend,

Appellee,

vs.

T. J. FORSCHNER CONTRACTING CO., a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 19, 1920, plaintiff recovered a judgment against defendant for $12,500, rendered by the Circuit Court of Cook County upon the verdict of a jury in an action for damages for personal injuries. Three fingers of her left hand were so badly crushed by the wheels of a train of cars as to necessitate amputation. The train and the temporary track upon which it was running were being used by defendant in hauling excavated soil to a dumping ground. Defendant appealed, and, on October 4, 1921, this appellate court reversed the judgment, made a finding of facts that defendant was not guilty of the negligence charged in plaintiff's original count, or of the wanton or willful conduct charged in her additional count, and did not remand the case. (222 Ill. App. 638, opinion not published.) Thereafter plaintiff sued out a writ of error from the Supreme Court "on the ground that the validity of a statute and the construction of the constitution are involved, and these questions arose for the first time in the appellate court." On April 14, 1924, the Supreme Court reversed the judgment of this appellate court and remanded the case with directions that this court "affirm the judgment of the circuit court or reverse and remand the case to that court for a new trial." (Mirich v. Forschner Contracting Co., 312 Ill. 343,

358.) Thereafter the case was re-docketed here and counsel for the respective parties were allowed to file, and did file, additional briefs.

The Supreme Court in the opinion said (p. 346) that the important question there presented for determination was whether, if the statute (section 120 of the Practice Act) be construed to apply to cases where the evidence is conflicting, it is invalid as repugnant to the constitutional right of trial by jury. And the Court, after an exhaustive discussion of the question, further said in conclusion (p. 358):

> "This being a case tried by jury, - and the evidence of plaintiff seems unquestionably to have tended to establish a cause of action, - the statute did not authorize the appellate court to reverse the judgment with a finding of facts and not remand the case. If the statute be construed to authorize the judgment of the Appellate Court in this case, it would authorize that court, in any case depending on facts, where the evidence was conflicting, to weigh and determine on which side is the preponderance of the testimony which that court believed, and would give that court the power to exercise the functions of a jury, which we have repeatedly held the trial court could not do, and the statute would be as much a violation of the right of trial by jury as if it had attempted to confer the same power on the trial court. One of the recognized benefits of trial by jury is that the jury sees and hears the witnesses, which gives them superior advantage over a reviewing court in determining the credibility of the witnesses and the weight and credit that should be given their testimony. Construed to apply only to cases where a jury was waived by the parties in the trial court or to cases where the trial court was authorized to direct a verdict, we think the statute is constitutional."

Plaintiff's original declaration consisted of one count, to which defendant filed a plea of the general issue. This count, after stating the physical situation surrounding the place of the accident and that plaintiff, a minor of about two years of age, was "lawfully" walking along and near to defendant's railroad track and exercising ordinary care for a person of her age, alleged that defendant, by certain of its servants then and there in charge of a train of dump cars being propelled by a locomotive upon said track and near to plaintiff, "so negligently and carelessly ran, managed and operated the said dump cars and locomotive, * * without

keeping any lookout ahead of the same, and without sounding any warning signals of danger to plaintiff, or taking any precautions whatever to stop the said dump cars and engine or to avoid striking plaintiff," that by reason thereof plaintiff was struck and injured, etc. On the trial, after plaintiff's evidence had been introduced and a motion to direct a verdict for defendant had been denied, plaintiff filed an additional count alleging that defendant "failed to stop its said locomotive and train of cars when danger was imminent to plaintiff, and carelessly, recklessly and wantonly ran its engine and train of cars upon and against plaintiff," whereby she was injured, etc. To this additional count defendant filed a plea of the general issue. At the conclusion of all the evidence defendant again moved for a directed verdict in its favor but the motion was denied. Defendant also made two motions in writing that the jury be instructed that there could be no recovery in the case (1) under the original declaration or (2) under the additional count, but both were denied. After verdict the trial court denied defendant's motions for a new trial and in arrest of judgment and the judgment followed.

In the former opinion (unpublished) of this appellate court, the facts were outlined as follows:

> "The evidence in this case shows that the accident occurred on June 27, 1917. At that time the defendant was engaged in working upon a contract with the Sanitary District of Chicago to construct a section of the Calumet intercepting sewer along a route which included 127th Street. The Sanitary Board reserved the right to furnish its own dumping place for the spoil and did furnish such dumping place upon a certain lowland lying three-quarters of a mile south of 127th Street on the Little Calumet River and to the west of the right of way of the Pennsylvania Railroad Company. It had secured the right to dump the excavated soil upon this tract and to lay tracks and operate dummy engines over the land. This right of dumping and operation the defendant was authorized by the Sanitary Board to exercise. The defendant entered into an agreement with the Pennsylvania Railroad Company whereby it secured the right to lay tracks upon the railroad company's right of way over a stretch of land seventeen feet wide on the west side of the railroad tracks for a distance of 1190 feet south of 127th street to the Indian boundary line where the land provided for dumping space begins and runs thence south to the river.

The defendant constructed a track in the fall of 1916, from 127th street south along the right of way of the Pennsylvania Railroad to the Indian boundary line, a distance of 1190 feet. The track then curved to the west to the dumping space and continued in a southwesterly direction to the river.

The father of the plaintiff made an arrangement with the manager of the defendant company whereby he built a house or a shanty on a high piece of ground in the northerly part of the dumping space and south of the Indian boundary line, which house was used by plaintiff's father as a boarding place for a gang of laborers who were brought by plaintiff's father to work for the contractor in performing the contract above mentioned. There was some conversation between these parties as to the right of either of them to erect a structure of this kind upon the dumping ground, but the house was erected in 1917 about thirty feet west of the Ferschner tracks and the expense of the labor and materials used in the erection of the same was paid by plaintiff's father. The house faced the west but had an enclosed porch on the east side toward the tracks. The mother of the plaintiff testified that she never allowed her children to play near the tracks; that the porch was closed so that they could not get out, but that on the day of the accident plaintiff had slipped out the front way, which was on the side of the house farthest from the tracks; that plaintiff was gone about five minutes before the accident occurred. No evidence was introduced showing that any children had ever been seen near these tracks. South of 127th Street there are no roads or crossings, and no other habitations nearby. The tracks ran for 1190 feet on the right of way of the Pennsylvania Railroad, which was fenced on both sides.

The accident occurred at about 1 P.M. of the day mentioned on the part of the track which was located on the Pennsylvania Railroad's right of way at a point apparently some 200 feet or more from the house occupied by plaintiff's parents. The train was moving in a southerly direction and consisted of several dumping cars loaded with dirt which were being pushed by an engine. Two men were on the train; one of them, Perkowich, was standing on the second car from the front; and the other, Marriott, was the engineer in charge of the engine, which was on the rear end of the train.

Perkowich testified that he saw a child right in the middle of the track when the train was about 150 feet away; that he immediately began waving his hands to stop and shouted to the engineer, which he continued to do while the train was running over practically five rails; that he saw the engineer at the time but the latter was looking and waving his hand at some girls working in the asparagus field and did not look toward Perkowich. Perkowich then jumped from the train and tried to save the child but was too late. His testimony on cross-examination modifies this statement somewhat in that he says when he first saw the child she was at the rail and not in the middle of the track.

The engineer testified that he was not waving his hand to girls in the asparagus field and that he did not see any girls there and did not see or hear any signals given by Perkowich; that the first he knew of the little girl's presence was when he heard her scream at the time of the accident; that he applied the brakes, stopped the train immediately and ran back and picked up the child, who was lying in the weeds to the west of the track."

On the former hearing before this court defendant's main contention was that the trial court had erred in refusing to grant its motions for a directed verdict, and for the reason that the evidence did not show that it had been guilty of any actionable negligence, or of any wanton or willful conduct in injuring plaintiff. Defendant's counsel argued that plaintiff was a trespasser at the time she was injured; that defendant owed no duty to a trespasser except not to willfully or wantonly injure her; that this was so even though she was an infant of tender years; that negligence and willfulness or wantonness are clearly distinguishable, and are "as unmixable as oil and water" (citing Chicago Rock Island & Pacific Ry. Co. v. Hamler, 216 Ill. 525, 540, wherein there is quoted with approval a portion of an opinion of the U. S. Circuit Court of Appeals, seventh circuit, in the case of Kelly v. Malott, 67 C.C.A. 545, 550); and that there was no evidence that defendant's operatives of the train were guilty of willful or wanton conduct in injuring plaintiff. Counsel for plaintiff, on the other hand, argued that she, on account of tender years, should not be regarded as a trespasser, and because she was rightfully on the track at the time of the accident in pursuance of the "invitation" of defendant; that whether or not rightfully there, she was not a trespasser as to defendant, the latter being a mere licensee of the Pennsylvania Railroad Company (citing Stansell v. City of Chicago, 297 Ill. 436); and that under the evidence the case was properly submitted to the jury on the wanton count of the declaration. In commenting on the contention that plaintiff was on the track by "invitation" of defendant, we said in our former opinion that it "seems to be based upon the fact that plaintiff's father had been employed by defendant and had been permitted to build a boarding house upon the dumping place. It will be noted that the accident took place at a considerable distance from the house of plaintiff's father

and not upon the ground reserved for the dumping space. No authorities are cited in appellee's brief which would tend to show that these transactions between plaintiff's father and the defendant could be considered as an invitation for the child to go upon the tracks. There is no claim made or argument advanced that the defendant was maintaining an attractive nuisance." And, in commenting on the contention that plaintiff was not a trespasser as to defendant (it not being the owner of the ground where the accident occurred but only in possession of and using the land under an agreement or license from the Pennsylvania Railroad Company) and after reviewing the Stedwell case cited in support of the contention, we held in substance that the contention was lacking in merit and that the cited case was not in point. And we further held in substance that it is a well settled rule that no duty is owed to a trespasser except not to willfully and wantonly injure such trespasser; that this rule is applicable to a minor of tender years (citing Wabash Railroad Co. v. Jones, 163 Ill. 167; Norman v. Bartholomew, 104 Ill. App. 667; Colby v. Chicago Junction Ry. Co., 216 Ill. App. 316); and that the rule seems to be general and not limited to railroad companies only (citing Gibson v. Leonard, 143 Ill. 182; Guzzy v. Adams, 234 Ill. 380.)

From the opinion of the Supreme Court it appears that, after this appellate court had reversed the judgment of the circuit court without remanding the case, plaintiff in the Supreme Court attacked the validity of section 120 of the Practice Act in so far as it purported to permit the appellate court, upon making a finding of facts different from the finding of a trial court, to reverse a judgment in a case tried before a jury without remanding the case, where the evidence in the trial court was conflicting. No attack was made upon the power of the appellate court to reverse such a judgment and remand the case for a new

trial, where it finds that the verdict and judgment are clearly against the weight of the evidence. And we do not understand that such a power is now questioned by plaintiff's counsel. Under many prior decisions of the Supreme Court, the appellate court clearly has such a power, which it is its duty to exercise in the proper case. (Chicago & Alton R. Co. v. Heinrich, 157 Ill. 388, 394; Veigt v. Anglo-American Provision Co., 202 Ill. 462, 465; Illinois Central R. Co. v. Smith, 208 Ill. 608, 620.) And, as we read the opinion of the Supreme Court, no new limitations were placed upon the power of the appellate court, in a proper case, to reverse and remand a case. Plaintiff's counsel, however, in their additional brief herefiled, call attention to a certain statement in the opinion (p. 345): "There were but two eye-witnesses to the accident, - the brakeman and the engineer of the train which struck and injured plaintiff; the testimony of the brakeman, who was a witness for plaintiff, tended to establish the cause of action, while that of the engineer tended to rebut it." And counsel argue: "the only question of fact, then, left for this court to decide, on this record, is the question of whether or not the evidence of the witness, Perkowich, is so clearly overcome by the evidence of the witness, Marriott, that this court ought to reverse the judgment and award a new trial." Regarding the issue of defendant's negligence, as charged in the original count, the conflicting testimony of Perkowich and Marriott as to the details of the accident was not all the evidence. That the train was going only about ten miles per hour, that defendant's track at the place of the accident was fenced in, that the place was in a district where no one was expected to be found, that there were no road crossings over the tracks or habitations in the vicinity other than the house built by plaintiff's father, that no children had been seen before on the tracks, that plaintiff had slipped away from the care of her mother and from the house about five minutes before the accident

and was a trespasser on the tracks, were, we think, facts to be considered, in connection with the testimony of Perkowich and Marriott, in determining whether or not defendant was guilty of the negligence charged. As to defendant's willful and wanton conduct, as charged in the additional count, it appears from Perkowich's testimony that immediately after seeing plaintiff on or near the track he did all that he could to stop the train by signaling and shouting to Marriott, the engineer in the locomotive at the rear end of the train, but that he could not attract Marriott's attention in time because the latter was looking over into an adjoining field, and that he then jumped from the train and unsuccessfully tried to save plaintiff. And it appears from Marriott's testimony that he was not aware of plaintiff's presence until after the accident had occurred, when he heard her scream and immediately applied the brakes and stopped the train. In Bernier v. Illinois Central R. Co., 296 Ill. 464, 470, it is said: "To constitute a wanton act the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury. * * Whether an act is willful or wanton is greatly dependent upon the particular circumstances of each case. Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others it will justify the presumption of willfulness and wantonness." Applying these rules to the facts in evidence, it seems clear to us that Marriott was not guilty of any wanton conduct at and before the time of the accident. We are of the opinion that, on the issue of defendant's negligence, the verdict and judgment are clearly against the weight of the evidence; and, as to the charge of defendant's willful and wanton conduct as contained in the additional count, that there is no evidence in the record to sustain it; and that the trial court

erred in failing to instruct the jury on defendant's motion that there could be no recovery on that count.

The Supreme Court in its remanding order directed us to "either affirm the judgment of the circuit court or reverse and remand the case to that court for a new trial." For the reasons above stated we are of the opinion that the judgment of the circuit court should be reversed and the cause remanded, and it is so ordered.

REVERSED AND REMANDED.

Fitch, P. J., and Barnes, J., concur.

225 - 29314

236 I.A. 627

CHARLOTTE NIEMAN,
Complainant and Appellee,

vs.

CLEMMONS NIEMAN,
Defendant and Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE BRIERLY DELIVERED THE OPINION OF THE COURT.

Defendant prosecutes this appeal from an order of the Superior Court of Cook County entered November 24, 1923, in which, after a hearing upon defendant's belated demurrer to complainant's petition (filed August 24, 1923) and upon defendant's motions to vacate the court's previous order (entered on said petition on September 21, 1923, after a full hearing) and to vacate the modified order of November 22, 1923, the court ordered that said demurrer be overruled and said motion be denied.

On June 11, 1921, the Superior Court entered a decree granting a divorce to complainant, to whose bill of complaint defendant had filed an answer, and had consented to an immediate hearing. It was further ordered in the decree that complainant should have the care, custody and education of two minor children of the parties, Myrtle and Genevieve Nieman; that defendant should pay to complainant for their support and education, $60 per month for Myrtle and $55 per month for Genevieve, and in addition ~~XXXX~~ all doctor's and dentist's bills incurred by, for ~~and on~~ behalf of them; that said monthly payments should continue as to each of the children until each should reach the age of 18 years; and that "thereafter said defendant shall pay to the complainant for the support, maintenance and education of each of said children such sums as the court may direct on proper application being made to the court." It was further

ordered in the decree that, "it appearing that the parties have settled their property rights," defendant should pay to complainant $2280, and deliver to her certain mentioned household and personal property, and also pay to her $150, as and for her solicitor's fees, court costs and expenses, in full of all her claims for alimony, court costs and expenses incurred in the suit; and, it further appearing that said defendant has turned over the aforesaid property and money to the complainant, that "said complainant has no further claim for support upon the said defendant or interest in his property <u>except</u> for the payment of the sums ordered to be paid her for the care, support, maintenance and education of said minor children."

On August 24, 1923, complainant filed her petition, entitled in said divorce proceeding, in which she mentioned the provisions of the decree, the illness of the child, Genevieve, who had reached the age of 18 years, the child's inability to work and support herself, and the charges of a certain physician for services rendered to the child. She asked that defendant be required to pay said charges and in the future to pay suitable sums for the care and support of the child.

On September 21, 1923, after a hearing on the petition, the court entered a draft order in which defendant was directed to pay to said physician $65 within 30 days, and to pay to complainant "for the support and maintenance of said Genevieve Nieman the sum of $55 per month, commencing from August 1, 1923; that the payments for the months of August and September be made within five days and that all further payments be made in two equal installments on the 1st and 15th of each month until the further order of this court." Defendant was also directed to pay to complainant $60 for the support of the other child, Myrtle, within five days. In the order the court, after stating that the parties were in court, that defendant <u>had answered the</u>

petition orally and that evidence presented by the parties had been heard, made findings in part as follows:

> "That by the decree for divorce, entered herein on June 11, 1921, granting said complainant a divorce from said defendant, it was ordered, adjudged and decreed, according to agreement between complainant and defendant, that after each of said minor children arrived of age the defendant shall pay to the complainant, for the support, maintenance and education of each of said children, such sums as the court may direct on proper application being made to the court; * * that proper application has been made in this cause; that said child, Genevieve Nieman, is an invalid suffering from valvular heart trouble and incapable of working and supporting herself; that defendant is engaged in the cigar business and is fully capable of supporting her; that she was 18 years of age on August 2, 1923; that defendant, though requested, has not paid anything to complainant for the support and maintenance of Genevieve Nieman since July, 1923; * * and that the sum of $55 per month is necessary for the care and maintenance of said Genevieve Nieman."

No appeal from this order was prayed or taken by defendant during the term of court in which it was entered.

On November 1, 1923, defendant filed a verified answer to a rule made upon him to show cause why he should not be punished for contempt for failure to comply with said order of September 21, 1923, in which answer he prayed that "on account of the changed conditions of the parties," said order of September 21st "be wholly vacated as far as it applies to Genevieve Nieman;" that the rule on him to show cause be discharged; and that, if the court shall not see fit to vacate said order altogether, that the amount which he is required to pay for the support of Genevieve "be reduced to a nominal sum." In the answer he alleged that he had complied with the provisions of the decree of June 11, 1921, up to and including the month of August, 1923, and that since that time he had complied with the decree as to the payments for the benefit of Myrtle Nieman; that since Genevieve Nieman attained her majority on August 2, 1923, and beginning with the month of September, he has contributed $30 towards her support; and that "he is unable to pay any more."

While he alleged that he was not allowed by the holder of a demand mortgage of $7,000 on his said cigar business to draw out of said business more than $50 per month, no facts are alleged showing his financial inability to make all payments for the benefit of both children as previously ordered.

On November 22, 1923, the court allowed new solicitors for defendant to enter their appearance in the cause (instead of the former solicitor who had withdrawn) and also allowed them on defendant's behalf to file a demurrer to complainant's petition of August 24, 1923. In the demurrer it is stated, as cause therefor, that petitioner (complainant) is not a proper party to the petition, for the reason that Genevieve Nieman, being now over 18 years of age and an adult person and complainant not being her guardian or conservator, should have filed the petition in her own name, etc. On the same day there was a hearing in open court on said rule on defendant to show cause, etc., and the court entered an order that "the order heretofore entered herein on September 21, 1923, (requiring said defendant to make payments of $55 per month for the support of said Genevieve Nieman) be modified, and that said sum be reduced to $40 per month, and that said order of September 21, 1923, remain unchanged in all other respects." On November 24, 1923, the order appealed from, first above mentioned, was entered.

After careful consideration of the present transcript we are of the opinion that the order appealed from should be affirmed. While the divorce decree of June 11, 1921, did not say that the provisions therein, as to the allowance of a lump sum for alimony to complainant and as to defendant paying to complainant further support money for each of the children both before and after they reached the age of 18 years, were by the consent and agreement of the parties, still it sufficiently appears from the recitals of the court's order of September 21,

1923, entered after a full hearing and the taking of evidence, that such was the case. Defendant could properly consent to those portions of the decree, and, having done so, they are binding upon him. (Buck v. Buck, 60 Ill. 241, 242; Storey v. Storey, 125 Ill. 608, 610; Miller v. Miller, 234 Ill. 16, 20.) After Genevieve Nieman became 18 years of age complainant, in accordance with the provisions of the decree, made "proper application" to the court, by her petition of August 24, 1923, for proper payments to be made to her by defendant for the future support and care of Genevieve, who was then an invalid. There was a full hearing on the petition and the court found from the evidence, and so recited in its order of September 21, 1923, that Genevieve was then incapable of working and supporting herself because of her affliction and that defendant "was fully capable of supporting her." And the court in the order directed defendant to pay to complainant for the support of Genevieve $35 per month commencing August 1, 1923, and to make the other payments therein mentioned. No appeal from this order was prayed or taken by defendant during the term it was entered (Sec. 92 Practice Act; Western Plaster Works v. Lenergan, 85 Ill. App. 530); and it must be held that the facts as found by the court in that order are conclusive upon the defendant. He did not entirely comply with the order, and a rule to show cause was entered against him. In answer to the rule he stated that, beginning in September he had contributed $30 towards the support of Genevieve and was "unable to pay any more." This statement of a conclusion was not supported by any allegation of facts showing his financial inability by reason of any changed conditions since the entry of said order of September 21, 1923; nor was it supported by any proof so far as the present record discloses, there being no certificate of evidence contained therein. The court, however, on the hearing on said rule to show cause, re-

duced the monthly payment to be made by him for the support of Genevieve from $55 to $40, and defendant cannot complain of this reduction in his favor. On the same day he unsuccessfully made a belated attempt to have the court review its own order of September 21st, long after the term at which it was entered had passed, and from which he had not appealed. The order appealed from should be affirmed and it is so ordered.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

29332

243 - 29332

236 I.A. 627

E. C. RAYNER,
Appellee,

vs.

THE POLISH NATIONAL PUBLISHING COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for $2845 rendered against it by the Municipal Court of Chicago, in an action upon a written contract, upon a directed verdict for plaintiff given at the close of all the evidence. The contract, dated May 9, 1921, is set out in haec verba in plaintiff's statement of claim, and plaintiff states that his claim is for $2845 for a balance due for commissions, as shown in an itemized account accompanying the statement, on certain advertising contracts procured by him for defendant, the publisher of the "Polish National Daily".

In the contract plaintiff agrees "to solicit advertisements for publication in said Polish National Daily * * at the rate of $2 per inch per insertion," and "to handle all changes of copy from the said advertising solicited by him, and also to solicit 'write-ups' or news stories in English concerning such advertisements." The Publisher (defendant) agrees to publish the advertisements, etc., in its paper, but "reserves the right to reject such advertisements and write-ups secured from persons who have no financial rating, or where they are against the policy of said Polish National Daily. This does not, however, authorize the Publisher to reject legitimate business secured or presented by E. C. Rayner." It is further provided that, in consideration

of plaintiff's services, the Publisher will pay him the sum of 50 per cent of the amount charged by it for said advertisements, payable as follows: "25 per cent to be paid at the time of acceptance by the Publisher of said advertising contracts, which must be done or rejected within 24 hours after the receipt of said contracts, and 25 per cent at the time the money becomes due and payable to The Publisher for said advertisements." It is further provided that The Publisher will furnish "contract forms" to be used by plaintiff in soliciting advertisements.

In plaintiff's itemized account for the months of May, 1921 to May, 1922, inclusive, are stated the names of the parties with whom advertising contracts were made through plaintiff, and the amounts due and payable to defendant from each, and for each of said months. The aggregate amount is $11,380, 25% of which, or $2,845, is claimed to be due plaintiff.

In defendant's amended affidavit of merits two defenses are stated, viz: (1) that the conditions of plaintiff's contract were not complied with by plaintiff, in that he did not give defendant an opportunity of passing upon the financial rating of the various parties who signed advertising contracts, but himself approved some of them, and (2) that defendant had collected on all contracts solicited by plaintiff the sum of $8,016.28, of which he would be entitled to receive $4,008.14, and defendant has paid him $4,133.35.

As to the first defense, the court properly ruled that the evidence introduced by defendant did not sustain it. The main issue of fact to be determined under the second defense (treating the same practically as a denial that defendant is indebted to plaintiff in any sum) was: What amount, if any, is due plaintiff on accepted advertising contracts, procured by him for defendant, where the advertisements of the parties were actually published

in defendant's paper during the months mentioned in plaintiff's itemized account? It is to be noted that by the terms of the contract sued upon plaintiff's first 25 per cent of the amount of an advertising contract was to be paid him when such contract was accepted by defendant, and a second 25 per cent was to be paid him as and when the amounts of a contract became due and payable to defendant under its terms. The court also properly ruled that plaintiff's second 25 per cent was not dependent upon the amounts actually collected by defendant from advertisers obtained by plaintiff but upon such amounts as and when they became due and payable to defendant. And there was introduced in evidence one of the "contract forms," signed by one of the advertisers procured by plaintiff, wherein defendant was authorized "to insert our advertisement of two inches to appear once a week, for a period of 52 weeks in the Polish National Daily * *, in consideration of which we agree to pay the sum of $2 per inch, payable monthly upon publication of same."

Plaintiff testified in substance that, commencing at the date of the contract (May 9, 1921) he turned in, on Saturday of each week and usually to defendant's secretary, such advertising contracts as he had obtained during that week; that it was her business, or that of some other officer of defendant, to accept or reject them within 24 hours; that on those contracts which were accepted he was paid immediately 25% of the respective amounts; and that this method of procedure continued until early in September, 1921, when he became advertising manager of defendant, after which time and until December 4, 1921, when he left defendant's service, he approved all advertising contracts, notified defendant's credit department, and if that department found the proposed advertiser's credit to be satisfactory he was paid immediately 25% of the amount of the contracts. He was asked on direct examination: "How much is due you from defendant for services rendered?" The trial

court, in overruling defendant's objection to the question, said: "Let him tell what he figures is due, and let the other side tell what they figure is due, and we will let the jury decide what figure, if any, is due." And the witness answered: "$2845, as near as I can figure it." He further testified in substance that he had received from defendant approximately 25% of the amounts for all accepted orders for advertising solicited by him, which was "around" $4,000; that on all the contracts mentioned in his itemized account he had received the first 25 per cent of the amounts thereof, and that his present claim was for the second 25 per cent of said amounts which became due to him upon the several publications of the advertisements in defendant's paper; and that he had a record of the papers and their dates. He did not, however, produce any of defendant's published papers or attempt to show thereby what advertisements actually had been published. Being asked on cross-examination to produce his private account book, he did so; and he further testified that this book showed that he had received from defendant the total sum of $4,669.65.

Defendant called as witnesses Helen Chrzanowski, its secretary prior to August, 1921, and Harriet Uczciwek, its book-keeper until shortly before the trial. The former testified that, from the date of the contract sued upon (May 9, 1921) until she ceased acting as secretary, plaintiff every Saturday brought to her such advertising contracts as he had procured during the week; that she paid him 25 per cent of the amount of all contracts which were accepted by defendant; but that some of the contracts presented by plaintiff were not accepted by defendant. Harriet Uczciwek produced certain of defendant's books, showing "accounts receivable" from those parties with whom plaintiff had made advertising contracts which had been accepted by defendant. She testified that the entries were in her handwriting, and made in the

usual course of business. Defendant's attorney stated that from these accounts it could be ascertained on what accepted contracts advertisements had actually been published and the amounts of the contracts. It did not sufficiently appear from the preliminary questions put to the witness that such would be the case, and the court properly refused to admit the accounts in evidence, or to allow the witness to state the "total amount of all contracts" submitted by plaintiff. But the court thereupon instructed the jury to return a verdict in plaintiff's favor for the full amount of his claim, $2845.

After a careful examination of the evidence we think that the court erred in so instructing the jury, for the reason that plaintiff's testimony as to the amount due him was too uncertain and too indefinite. He claimed $2845, "as near as I can figure it;" that this total amount claimed was for the second 25 per cent commission on the amounts of certain accepted advertising contracts which he had procured; and that he had previously been paid the same total amount when said contracts were accepted, being for the first 25 per cent under the contract sued upon, yet he testified that he had received from defendant the total sum of $4,669.65, which at least suggests that defendant had paid him a second 25 per cent of such amounts of certain advertising contracts as had become due and payable to defendant according to the terms of the contracts. We do not think that his further testimony to the effect that his itemized statement only included those contracts which he had kept a record of, and did not include all contracts procured by him, sufficiently explains the discrepancy. It was for the jury, and not the court, to determine what amount, if any, was due him. Plaintiff's counsel contend that, because of the pleadings and certain rules of the Municipal Court applicable thereto, the amount of plaintiff's claim, as stated in his statement of claim, must be considered as having been admitted by de-

fendant. In view of the allegations in defendant's affidavit of merits the contention is without merit. Furthermore, we cannot take judicial notice of the rules of the Municipal Court unless they are included in the bill of exceptions or appended thereto and properly certified (Hoenes v. Rooney, 293 Ill. 370, 373), and no rules of that court, properly certified, are contained in the present record.

Our conclusion is that the judgment of the Municipal Court, rendered upon a directed verdict for plaintiff, should be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Fitch, P. J., and Barnes, J., concur.

29338

249 - 29338

INTERNATIONAL ACCOUNTANTS SOCIETY, a Corporation,
Appellee,

vs.

JESSIE J. MAXWELL,
Appellant.

236 I.A. 627

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to reverse a judgment of the Municipal Court of Chicago for $120, rendered against defendant after a directed verdict for plaintiff in an action to recover a balance due upon defendant's promissory note.

The note is set forth in plaintiff's statement of claim, filed June 11, 1923. It is dated May 4, 1921, and by its terms defendant promised to pay to plaintiff's order $140, "on the following terms: $10 herewith, and the sum of $10 on the 4th day of each succeeding month until fully paid." Defendant, in her affidavit of merits pleaded "failure of consideration" as a defense, and in support thereof alleged that "plaintiff agreed to furnish defendant with a certain course of study in accountancy consisting of 90 printed and written lessons, and to give instruction and tuition therein; that such agreement was the consideration for the alleged promise of defendant; and that plaintiff did not furnish said 90 lessons as agreed but furnished 26 lessons only and gave defendant no instruction or tuition."

On the trial, in November, 1923, plaintiff introduced in evidence the note sued upon, showed that defendant had made one payment of $10, besides the initial payment of $10, leaving a balance due of $120, and rested its case. Defendant was the only witness called in her behalf. She testified that on the day she executed the note she also signed a written contract with plaintiff, in which

she agreed to pay plaintiff the same amount of money and in the same installments as mentioned in the note, in consideration of plaintiff's agreement, as stated in the contract, to furnish her with "the complete I.A.S. Elective Course of Instruction in Advanced Accounting, in accordance with the terms of this special offer." She introduced in evidence plaintiff's special offer and the contract (all contained in one instrument). To members of the Society plaintiff offered to give its full advanced accounting course of 90 lessons, including tuition and instruction therein, and under the contract defendant became a member of the Society. It is provided in the contract, inter alia, that it is "not subject to revocation;" that "no reduction in fees will be made on account of withdrawal;" and that "in the event of any one payment becoming delinquent 60 days without the written consent of the International Accountants Society the unpaid balance immediately becomes due and payable." She further testified that she made but one payment of $10 on the note or contract besides her initial payment, and that she received from plaintiff 26 lessons. Although the burden rested upon her to prove her plea of "failure of consideration" of the note, her testimony did not tend to support the plea. While receiving said lessons she defaulted in the monthly payments, and for aught that appears to the contrary from her testimony the fact, if it is a fact, that she did not receive all the lessons, or tuition or instruction therein, was occasioned by her own fault or neglect. When plaintiff commenced its action the entire amount of the note, less said payments, had long since matured. There was no issue of fact for the jury to pass upon and the court did not err in instructing the jury to find the issues for the plaintiff and to assess its damages in the sum of $120, or in entering judgment against defendant on the verdict returned.

For the reasons indicated the judgment of the Municipal Court is affirmed. AFFIRMED.

Fitch, P.J. and Barnes, J., concur.

265 - 29354

JACOB L. HARRIS and
LeROY F. HARRIS,
copartners, etc.,
Appellees,

vs.

SAMUEL RIFAS,
Appellant.

236 I.A. 628

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On August 30, 1923, in the Municipal Court of Chicago, plaintiffs caused a judgment by confession for $2635 to be entered against defendant on his judgment note for $2350, dated June 20, 1923, due and payable to plaintiffs at Chicago on July 19, 1923, with interest at seven per cent per annum after date. There was an endorsement on the note showing that a payment of $500 had been made thereon on August 3, 1923. The amount of the judgment was made up by adding to the balance of the principal sum due, viz, $2350, accrued interest to the amount of $35, and $250 for attorneys' fees. The note provided that in case judgment was confessed reasonable attorneys' fees might be included in the judgment. An execution was issued on the judgment and returned on October 30, 1923, no property found and defendant not found. Following the institution of certain garnishment proceedings, defendant appeared on November 5, 1923, (more than 30 days after the entry of the judgment) and moved the court to set aside the judgment and that he be given leave to defend, etc. The motion was supported by defendant's affidavit. The court denied the motion and this appeal followed.

"On a motion to vacate a judgment, confessed by authority, and for leave to plead, the question is not whether the judgment should be set aside because of errors of law but whether there exists any equitable reasons for opening the

judgment to let in a defense." (Meyers v. Schendorf, 238 Ill. 232, 233. "A motion to vacate a judgment entered by confession is addressed to the sound legal discretion of the trial court, whose action in denying it will not be reviewed unless it appears that it has been abused." (Keehler v. Gleum, 169 Ill. App. 537, 539.) "If the affidavit in support of the motion to open the judgment did not 'disclose a clear and equitable reason for opening the judgment and allowing the appellant to plead,' then it was not an abuse of the discretion with which the court is vested in this matter of judgments by confession to deny the motion." Bevier v. Hern, 160 Ill. App. 547, 552.) We have carefully read defendant's affidavit presented in support of his motion and are of the opinion that the facts as therein alleged do not disclose any equitable reason for opening up the judgment, or that there was no consideration for the note, and that there was no abuse of the court's discretion in denying defendant's motion. We look upon certain allegations contained in the affidavit relative to a contemporaneous parol agreement between the parties as an attempt to vary the terms of the note absolute on its face, which the law does not allow. (Mumford v. Telman, 157 Ill. 255, 265; Harlow v. Russell, 15 Ill. 96, 97; Schultz v. Meyer, 181 Ill. App. 335, 336; Shinner v. Raschke, 213 Ill. App. 324, 325.)

The order of the Municipal Court denying defendant's motion should be affirmed, and it is so ordered.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

274 - 29363

236 I.A. 628

SALZMAN PRISERT COMPANY,
a corporation,
Appellee,

vs.

THE SUBSCRIBERS AT N. A. D. C.
INTER-INSURANCE EXCHANGE,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant for $2,820.92, rendered by the Circuit Court of Cook County on December 22, 1923, following the verdict of a jury, in an action upon an alleged oral contract for fire insurance on the machinery, goods, etc. of the plaintiff corporation, located at 4032-40 Elston avenue, Chicago, which corporation was a member of the National Association of Dyers and Cleaners (N.A.D.C.).

During the trial it was stipulated that the value of the articles destroyed or damaged by the fire amounted to $2,820.92. There were no questions involved as to plaintiff's payment of the premium or as to the giving by it of due notice of loss or proofs of loss.

Plaintiff operated a dyeing and cleaning plant at Nos. 4032-40 Elston avenue. There was no number 4036. Nos. 4032-34 had a frontage of 50 feet and plaintiff was the lessee of an old building situated on the front of the lot. In 1916 or 1917 plaintiff had erected two other buildings on the rear of the lot, - one a one-story frame building and the other a one-story concrete block building. In June, 1919, plaintiff had erected a new building on the adjoining 50 foot lot, known as Nos. 4038-40. It was set back about 65 feet from the front of the lot, and access thereto was had only through the old building on the front of Nos.

4032-34, which was the main entrance to the plant. In the new building on Nos. 4038-40 there was a dye-room, a storeroom, a garage, and the private office of plaintiff's president, Fred Salzman. The fire, which occurred on the night of November 6, 1920, was confined to this new building and certain machinery and fixtures therein contained were destroyed or damaged. The main questions of fact for the jury to determine were, whether defendant, through its authorized agent, R. J. Farrington, made an oral agreement to insure plaintiff's property against fire as alleged, and whether that agreement covered the machinery and fixtures which were contained in the new building at Nos. 4038-40 Kinzie avenue.

Plaintiff's original declaration consisted of two counts, to which defendant filed a plea of the general issue. During the trial, on defendant's motion, the court instructed the jury to disregard the second count. No cross errors are assigned on this ruling. It is alleged in the amended first count that defendant is an association composed of many firms, individuals and corporations organized for the purpose of issuing insurance policies to its subscribers on the mutual or profit sharing plan to indemnify the holders of said policies against loss by fire; that on November 5, 1920, at Chicago, defendant then and there "agreed to issue to the plaintiff its policy of insurance indemnifying the plaintiff to the extent of $49,850, against all direct loss by fire or lightning of the property of the plaintiff, and more particularly to the extent of $8,000, for all direct loss or damage by fire or lightning of all fixtures and movable machinery and equipment, * * all while contained in the buildings of the plaintiff, situated at and numbered from 4032 to 4040 Kinzie avenue, Chicago, for the period of one year from November 5, 1920;" that on November 6, 1920, a fire occurred in one of the buildings whereby plaintiff sustained a loss of about $5,000; that it promptly

gave notice of the loss to defendant and within 60 days furnished proper proofs of loss; that although it has kept and performed all things required of it according to said agreement, yet defendant, though often requested, "has failed and refused to issue its policy to plaintiff indemnifying it according to its agreement as aforesaid," and has failed and refused to pay to it any part of the amount of the loss.

The following additional facts in substance were disclosed upon the trial: Defendant maintained its principal office at St. Louis, Missouri, and transacted its business through an attorney in fact, John L.Corley, who as such signed the policies of insurance. Farrington was Corley's or defendant's representative in Chicago. In 1918, plaintiff became one of defendant's subscribers and received its first policy of fire insurance from it. At that time Corley introduced Farrington to Salzman and thereafter Salzman, acting for plaintiff, had frequent dealings with Farrington relative to insurance matters. On June 10, 1919, defendant issued a new policy of fire insurance to plaintiff, which was about double the amount of the first policy. It was a blanket policy, and was issued in consideration of certain stipulations therein named and of a premium of $490.98, payable "on the delivery of this contract and on or before the 10th day of June, every year during the continuance of this contract." It was for the total amount of $21,000; of which $850 was on "office furniture and fixtures" contained in "the one and two story, brick composition roof building situate 4032-34 Elston avenue;" $6,000 on "fixed and movable machinery and equipment * * all while contained in the above described building;" and $14,150 "on goods of others held in trust for cleaning, renovating * * or dyeing, while on any of the premises owned or used by the insured in its business," etc. Shortly after this policy was issued the new building on the rear of the lot, known as 4036-40 Elston avenue, was completed. Plaintiff also carried burglary insurance

on its customers' goods, left with it for cleaning or dyeing, with an organization, similar to defendant's and called the "Cleaner's General Indemnity Exchange," of which Corley was the attorney in fact, and Farrington the Chicago representative. It had its principal office in the same suite as defendant in St. Louis, and the same advisory committee as defendant. In October, 1920, Farrington notified Salzman that he had received instructions from defendant's main office that plaintiff should increase the amount of its insurance. Subsequently, in answer to Salzman's letter of inquiry, defendant from its main office advised plaintiff to the same effect. Later Farrington called and gave Salzman a certain number of days to increase said amount or suffer the cancellationsof the existing policy. Later, on November 3, 1920, Farrington again called and he and Salzman had a lenghty conversation, partly in the latter's private office in the new building and partly in the main office in the old building. An inspection of the entire plant was made. Salzman testified in substance that Farrington said that unless the amount of insurance was materially increased defendant would cancel the existing policy as of November 5th, but that, if he (Salzman) would consent to such an increase, the old policy would be cancelled and a new policy issued including said increase as of November 5th, there being two days time to notify defendant's main office; that it was finally agreed that the insurance on customers' goods should be increased to $42,000; that he (Salzman) then told Farrington that, in consequence of this authorized increase on customers' goods, plaintiff would also increase the item of $6,000 on machinery and fixtures to $5,000 (an increase of $2,000) and have it apply to the new building on Nos. 4038-40, as well as upon the old buildings on Nos. 4032-34, so that the entire plant would be covered as to machinery and fixtures, and that plaintiff would also take new insurance, additional to that then carried in other companies, on

the two buildings situated in the rear of the lot Nos. 4033-34, to the extent of $500 on each building; that he (Salzman) also directed Farrington to double the amount of burglary insurance then carried on customers' goods in the "Cleaner's General Indemnity Exchange;" and that thereupon Farrington put down on a piece of paper all these increases and changes and told him (Salzman) that both old policies (fire and burglary) would be cancelled on November 5, 192[illegible], and new policies, embodying said increases and changes, would be issued as soon as possible to take effect as of that date. Farrington, while admitting that defendant's main office had instructed him to procure increased insurance from plaintiff or the then existing policy would be cancelled on November 5th, denied that, in his conversation with Salzman on November 3rd, any reference whatever was made to any increase in the coverage of $6,000 on machinery and fixtures, or that that item should be so re-written as to cover machinery and fixtures in the new building on lot Nos. 4038-40. He testified that no mention was made of the new building, or Nos. 4038-40, and that the first time he ever heard anything about the $2,000 increase on machinery or fixtures was during the trial of this action. Yet, it appears that the new burglary policy which he was requested to procure covered the cleaning and finishing plants of plaintiff, described as being at "4038-40 Elston avenue." And Salzman's testimony as to the proposed new and increased coverage on machinery and fixtures, and in the new building at Nos. 4038-40, is corroborated by plaintiff's witnesses, William Free and Gertrude Casey, bookkeeper and assistant bookkeeper for plaintiff, who claim to have been present during a portion of the conversation had on November 3rd, between Salzman and Farrington. On the day after the fire plaintiff notified defendant of the loss, and defendant wrote in reply on November 8th that it had referred the adjustment thereof to a Chicago adjustment company. Not until November 1[illegible]th did defendant

send the new policy, No. 1032, to plaintiff (which Farrington had agreed would be issued to take effect as of November 5th) although the said burglary policy was forwarded to plaintiff from the same office on November 9th. Without making a careful examination of the new fire policy Salzman immediately forwarded it to said adjustment company, and shortly thereafter that company notified him that it could not proceed further in the adjustment as the policy did not cover the loss, in that it did not include machinery, fixtures, etc. contained in the new building at Nos. 4030-40, where the fire occurred. Said new policy commenced the insurance as of November 5th; increased the annual premium from $490.98 to $1,056.82; mentioned the increased coverage on customers' goods to $42,000, as agreed; insured the two buildings on the rear of Nos. 4032-34 for $500 each; but the coverage on office furniture and fixtures and movable machinery and equipment remained the same as in the old policy ($850 and $6,000 respectively), and this coverage was limited to the property being contained in buildings at Nos. 4032-34. Salzman at once made vigorous protest to defendant by letter, later had personal interviews with Corley, and still later voiced his protest at a hearing before defendant's advisory committee at St. Louis. Plaintiff's claim was finally disallowed and the present action was commenced on November 2, 1921.

One of defendant's contentions is that plaintiff cannot recover for the reason that, notwithstanding the testimony as to the alleged verbal agreement between Salzman and Farrington on November 3, 1920, the terms of defendant's policy, No. 1032 (issued 12 days after the fire as of the day before the fire) must govern, and that said testimony was improperly admitted in that it amounted to an attempt to vary by parol evidence the terms of a written contract. We cannot agree with the contention. Plaintiff's suit was prosecuted on the theory that the conversation had on

November 3rd, between Salzman and Farrington, defendant's duly authorized agent, amounted to an oral agreement by defendant to insure plaintiff against loss by fire of the machinery and fixtures, to the extent of $8,000, contained in any and all of plaintiff's buildings, including the building in which the fire afterwards occurred. The suit was not brought upon the policy, No. 1032, but upon said oral agreement. It is the settled law of this State that oral contracts for insurance are enforceable. (Firemen's Ins. Co. v. Kuessner, 164 Ill. 275, 280; Cottingham v. National Church Ins. Co., 290 Ill. 26, 32; Hawthorne v. German Alliance Ins. Co., 181 Ill. App. 88, 92.) And we think it was for the jury to say under the conflicting evidence whether such an oral contract as claimed was made, and whether the property insured included the machinery and fixtures contained in the new building at Nos. 4038-40 Sloton avenue, and we cannot say that their verdict on these questions was manifestly against the weight of the evidence. The terms of the written policy, No. 1032, as finally issued, were not in accord with the verbal agreement as made, and as soon as Salzman was advised of those terms he protested and plaintiff refused to be bound by them or to accept the policy as written. The minds of the parties never met according to the terms of that policy. "While parol evidence cannot be resorted to to change the terms of a contract in writing, yet it is proper for the court to permit evidence introduced to show that the minds of the parties did not meet in the pretended contract." (Stone v. Baggott, 73 Ill. 366, 371.)

And we do not think there is any substantial variance between the allegations of plaintiff's first count and the proof. Nor do we think that the evidence contained in the present record is not sufficient, as defendant claims, to warrant the jury's finding that Farrington was authorized to make the oral contract sued upon. In Wilson v. Hartford Fire Ins. Co., 188 Ill. App. 181, 184, it is said: "The rule is well settled in this State that a person

dealing with an agent, having no notice of limitation of the power of the agent, will be justified in believing that the power of the agent is co-extensive with his undertaking." And in Hartford Fire Ins. Co. v. Farrish, 73 Ill. 166, 169, it is said: "After a loss, the company should not be permitted to shield itself behind an unauthorized act of its agent, unless the insured was informed of, or knew the extent of, the authority conferred upon the agent." (See, also, Faber-Musser Co. v. Peg Clay Co., 291 Ill. 240, 244.)

And in view of the stipulation as to the amount of the loss sustained by plaintiff by reason of the fire, we do not think that the court erred in giving instruction No. 4, requested by plaintiff. Instructions Nos. 13 and 14, requested by defendant, were, in our opinion, properly refused.

Finding no reversible error in the record, the judgment of the Circuit Court is affirmed.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

283 - 29372

236 I.A. 628

MOTOR TRANSPORTATION COMPANY,
a corporation,
Appellant,

vs.

T. N. WHITE, operating as
T. N. White Company,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the Municipal Court of Chicago for damage to one of its motor-trucks which, being driven backward upon a certain passageway on December 27, 1921, in the night time, was suddenly precipitated into a deep excavation dug by defendant. A jury returned a verdict finding defendant not guilty and plaintiff appealed from the judgment rendered in defendant's favor.

In plaintiff's statement of claim it is alleged in substance that at the time of the accident and for many months prior thereto there was an alley running north from Wilson avenue, an east and west street, at about 150 feet west of Sheridan road, a north and south street, in the city of Chicago; that about 40 feet north of the north curb line of Wilson avenue there was a private passageway, about 20 feet wide and leading from said alley and extending eastward about 110 feet, used by tradesmen, deliverymen and others in delivering merchandise at the rear of various stores facing Wilson avenue and Sheridan road; that many times before the accident plaintiff had used said alley and passageway, both during the day and the night time, in delivering merchandise by means of motor-trucks; that defendant knew or should have known of these conditions and it became his duty not to make excavations in the passageway without due notice or warning; that, not regard-

ing his duty, he negligently made an excavation across the passageway, and in the vacant lot adjoining it on the north, to a great depth, without any notice or warning of any kind to plaintiff and without plaintiff's knowledge; and that as a result of his negligence plaintiff's motor-truck, being driven upon said passageway by one of its chauffeurs who was in the act of delivering merchandise to one of said stores and in the exercise of ordinary care, moved or fell into said excavation, and was greatly damaged, etc.

In defendant's affidavit of merits he alleged in substance that he did not make any excavation in the passageway without notice or warning to plaintiff and others; that plaintiff's chauffeur was not in the exercise of ordinary care when he drove said motor-truck upon said passageway; and that defendant was not guilty of any negligence.

On the trial it appeared from the testimony of defendant's witnesses that about five o'clock in the afternoon, after an excavation had been made by defendant's men across said passageway about 100 feet east of the alley and to a depth of about nine feet, a barricade, consisting of boards suspended on barrels and with two red lights attached, was placed at the entrance of the passageway at said alley. Plaintiff's chauffeur testified in substance that about nine o'clock in the evening he drove the motor-truck, loaded with certain druggist sundries to be delivered to a drug store on the corner, north in said alley and thence backwards upon said passageway towards the east; that suddenly the truck fell into the excavation and was damaged; that he did not see any barricade or lights or other warning; that the alley and passageway were dark; that the truck had no light in the rear except the tail-light, but had bright headlights; that there was nothing to prevent him from driving the truck forward

in the passageway; and that had he done so he could have seen the excavation.

It is contended that the court erred in allowing defendant's attorney to ask certain questions of prospective jurymen on the voir dire. It appears that these questions were asked in connection with statements made by the attorney concerning the law as to preponderance of evidence, negligence, contributory negligence, etc. Upon examination of the transcript we do not think that the court in its rulings in these particulars committed any error prejudicial to plaintiff.

Although the jury were instructed orally, it is also contended that the court erred in refusing to give to them certain written instructions presented by plaintiff. Each of these instructions, similar in character, ended with the direction to find defendant guilty. The court modified one of these instructions and, as modified, included it in the oral charge. We have carefully examined the charge in its entirety and think that the jury, under the issues joined and the evidence presented, were fully and fairly instructed, and that the court did not commit any prejudicial error in the said refusal. (Young v. McDonnell, 110 Ill. 83, 84.) The evidence being conflicting on the question of defendant's negligence and strongly tending to show contributory negligence on the part of plaintiff's chauffeur, we think that the jury were fully justified in returning the verdict they did. The court properly denied plaintiff's motions for a new trial and for judgment non obstante veredicto. Accordingly the judgment is affirmed.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

289 - 29378

236 I A 628

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|---|---|
| NELLIE I. ENGLISH, Appellee, | APPEAL FROM |
| vs. | MUNICIPAL COURT |
| M. V. BRINK, Appellant. | OF CHICAGO. |

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class action in contract the Municipal Court of Chicago found the issues against defendant, assessed plaintiff's damages at $200, and entered judgment against defendant in that amount. Defendant appealed.

Plaintiff alleged in her statement of claim in substance that she was employed by defendant during the calendar year, 1922; that it was agreed that she was to receive a certain salary per week, and, in addition thereto, one per cent of the total gross receipts of defendant's business as commissions; and that said commissions amount to $200, which defendant has refused to pay to her.

She testified in substance that in the early part of January, 1922, defendant agreed to pay her $25 per week and a five per cent (5%) commission on her sales; that she immediately entered his employ and continued to perform services for him in his business until January 4, 1922, when she left; that about February, 1922, the agreement as to her commissions was changed by mutual consent to "one per cent on the entire sales for the year;" and that in April or May defendant increased her weekly salary from $25 to $30, which salary had been paid to her but nothing for commissions. It was admitted during the trial that defendant's gross receipts from his business during the year, 1922, were $20,000. Defendant denied having made any agreement to pay plaintiff any sum as commissions on gross receipts or

sales. He testified, however: "I told her that if she was faithful in her work and I made money, she would make money. * * I said if I made money she would make money, and the only way we figured it might be a small percentage of the profits. * * My entire gross receipts for the year, 1922, were approximately $20,000, but I did not make any profit out of the business."

It is contended that plaintiff's statement of claim is insufficient in that it fails to allege what were the gross receipts of defendant's business for the year in question. This is a fourth class action and the statement of claim sufficiently advised defendant of the case he was called upon to meet. (Paris Flouring Co. v. Imperial Gotto Milling Co., 181 Ill. App. 215, 219.) It charged that plaintiff, under the agreement as to her employment, was to receive a certain weekly salary and, in addition, a one per cent commission on the total gross receipts of defendant's business during the year, which commission amounted to $200, no part of which had been paid.

It is also contended that plaintiff failed to establish her case by a preponderance of the evidence. The main issue of fact to be determined by the court was whether defendant had verbally agreed with plaintiff to give her, in addition to her weekly salary, a commission of one per cent on defendant's total gross receipts from his business during the year, the amount of which receipts was admitted. On this issue plaintiff and defendant were the only witnesses and their testimony was in direct conflict. The trial judge, however, seeing the witnesses and observing their demeanor on the stand, evidently gave greater credence to the testimony of plaintiff, and we are not disposed to disturb that finding and say that it is against the weight of the evidence. We think the entire testimony discloses inherent evidences of the truth of plaintiff's version of the agreement of employment, and while

nature. In addition, however, it will hurt that if she was fortunate in her work and I earn money, she would make money. I I said if I made money she would make money. Now the only way we figured it works is a small percentage of the profits. My monthly gross receipts for the year, 1971, were approximately $50,000, but I did not make any profit out of the business."

It is contended that plaintiff's statements of claim in bankruptcy are that it fails to allege that some one gross receipts of defendant's business for the year in question. This is a fourth claim arises out the [illegible] of [illegible] activities without distinct of the year in question in part. [illegible] Chemicals Ltd. v. Deputy Minister [illegible], [illegible] 1[illegible]. It charges that plaintiff, under the agreement of the [illegible] equipment, was to receive a [illegible] monthly salary and, in addition, a one per cent commission on the total gross receipts of defendant's business during the year, which commission amounted to $[illegible], on part of which had been paid.

It is also contended that plaintiff failed to establish his case by a preponderance of the evidence. The main issue of fact to be determined by the court was whether defendant had some [illegible] agreed with plaintiff to pay him, in addition to his monthly salary, a commission of one per cent on defendant's total gross receipts from his business during the year, the amount of which was unknown. On this issue plaintiff and [illegible] the only witnesses and their testimony was in direct conflict. The trial judge, however, acting the [illegible] as finding [illegible] as the court, [illegible] in the [illegible] of plaintiff, and we see no reason to disturb that finding and say that it is against the weight of the evidence. The trial judge [illegible] discharge [illegible] of the [illegible] of the [illegible]

defendant's testimony negatives that version, it is clearly apparent therefrom that, in order to obtain her services, he agreed that she should receive something more than her weekly salary. In People v. Pfuhl, 275 Ill. 243, 251, it is said: "It does not necessarily follow that where one party testifies to one state of facts and another to a contradictory state of facts the evidence is equally balanced, or that there can be no preponderance of testimony. If there appears to be inherent evidences of the truth of one statement and the contradictory statement is unreasonable or carries with it suspicion, doubt and disbelief as to its sincerity and truth, it would be entitled to little or no credit and weight." In Herring v. Poritz, 6 Ill. App. 308, 312, it is said: "It will not do to say as a matter of law that there can be no preponderance of the evidence in favor of the party holding the affirmative, when there are but two witnesses upon the facts in issue, and one testifies contrary to the other. In such case, the court or jury may apply the usual tests of credibility, give credence to the testimony of one, if he appear more worthy of it, and reject that of the other."

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

292 - 29381

236 I.A. 628

LOUISE WEGNER,
Plaintiff and Appellee,

vs.

HARRY LANSKI, JOHN L. McNALLY, EDWARD J. OWENS and WILLIAM P. SWAIN,
Defendants,

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On appeal of HARRY LANSKI,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal Harry Lanski seeks to reverse a judgment for $6,000 rendered against him by the Circuit Court of Cook County in an action for damages for false imprisonment against Lanski and three police officers of the City of Chicago, McNally, Owens and Swain. During the trial plaintiff dismissed the action as to Swain. The jury returned a verdict finding McNally and Owens not guilty, but finding Lanski guilty and assessing plaintiff's damages at $10,000. Plaintiff's motion for a new trial as to defendants McNally and Owens was denied, and, upon plaintiff remitting $4,000 from the amount of the verdict against Lanski, the latter's motion for a new trial was also denied and the judgment followed.

Plaintiff's declaration consisted of three counts to which Lanski and the other defendants filed pleas of the general issue. In the first count it is alleged in substance that on April 2, 1921, and prior thereto plaintiff was employed in Lanski's home as a domestic, performing her duties with fidelity, etc.; that on said day Lanski maliciously and unlawfully charged plaintiff with having stolen certain of his goods and chattels, which charge "was wholly untrue and entirely without foundation or just or probable cause and was so known to be by said defendant;" that he

procured the assistance of McNally, Owens and Swain, police officers of Chicago, by falsely representing to them that she had stolen said chattels, and "induced and procured" them to unlawfully arrest and imprison her; that acting upon said inducement said police officers on the same day arrested and imprisoned her, "maliciously and unlawfully * * and wholly without just, probable or reasonable cause and without having any * * complaint, information or warrant on which to arrest, detain and imprison her;" that she was detained until the following day when, upon being brought before a judge of the Municipal Court of Chicago, she was released; and that in consequence thereof she was injured in her reputation and caused to suffer great mental pain and distress, to her damage in the sum of $10,000. In the second count it is charged that all four defendants, "did, on April 2, 1921, * * maliciously * * and unlawfully * * seize, detain and imprison plaintiff * * without any just or probable cause therefor, and without having any good or sufficient affidavit, information, indictment, writ or warrant," when upon the following day she was released, and that as a result she was greatly humiliated, suffered much pain of body and mind, and was prevented thereafter from securing employment, etc. The third count contains substantially the same allegations, as to Lanski being the procuring cause of her arrest and imprisonment, as contained in the first count, and also makes charges against all four defendants substantially the same as in the second count. We regard each of these counts as containing a charge of false imprisonment, and the allegations in reference to the arrest and imprisonment being made "without any probable or reasonable cause" may be regarded as surplusage. (Johnson v. Von Kettler, 84 Ill. 315, 318; Enright v. Gibson, 219 Ill. 550, 556.)

On the trial the evidence disclosed that plaintiff's arrest was made by defendants, McNally and Owens, after receiving

proposed the manslaughter of Kelly, Green and Dunn, making efforts at things, by falsely representing to them that she had taken such abortion, and "knowing and procuring" them to unlawfully accept and swallow poison that caused their death. The accused made police efforts on the same day accepted and procured her, "unlawfully and voluntarily * * and thereby at least, provided or procured means and without having any * * complicit, information or warrant on which to arrest, detain and imprisoned her," that she was so behaved until the following day when, upon being brought before a judge of the Municipal Court of Chicago, she was released; and that in consequence thereof she was injured in her reputation and caused to suffer great mental pain and anxiety, to her damage in the sum of $50,000. In the second count it is charged that she from a fund was, "did, on April 9, 1913, * * unlawfully * * and voluntarily * * aid, detain and imprison plaintiff * * without any just or reasonable cause therefor, and without having any good or sufficient evidence, information, complaint or warrant," when upon the following day she was released, and that as a result she was greatly humiliated, suffered much pain of body and mind, and was injured therefor in her reputation, etc. The third count contains substantially the same allegations, as to herself being the procuring cause of her arrest and imprisonment, as contained in the first count, and also avers, inter alia, that the defendants acted intentionally, the same as in the second count. In support each of these counts is established a charge of false imprisonment, and the allegations in reference to the arrest and imprisonment being made "without any probable or reasonable cause" may be regarded as surplusage. (Johnson v. Sun Printing, 94 Ill. 474, 481 [1880]; v. Gibson, 210 Ill. 486, 488.)

On the total the evidence discloses that plaintiff's arrest was made by detectives, Kelly and Dunn, after investigating

certain information from Lanski and his wife, and that said officers caused plaintiff to be imprisoned for a period of about a day and a half without any complaint being filed against her or any warrant issued. While the evidence was conflicting as to whether plaintiff's arrest was maliciously induced by Lanski, his testimony, and that of other witnesses produced in his behalf, showed that he repeatedly refused to file any complaint against her. The theory of his defense was that while he properly notified the police officers of certain acts of plaintiff (amounting to disorderly conduct upon her part), hoping thereby to prevent a repetition of those acts, and while he further informed them of plaintiff's attempted larceny, as he believed, of several silk shirts belonging to him, her subsequent arrest and imprisonment was brought about solely by the acts of officers McNally and Owens and against his repeated protests.

According to Lanski and his witnesses the happenings leading up to plaintiff's arrest and final release were substantially as follows: Plaintiff, employed as a domestic in Lanski's home, notified Lanski's wife that she would cease her employment and leave on Friday, April 1, 1921. On the evening preceding her departure Lanski discovered in a child's bedroom plaintiff's traveling bag and in the bag several of his silk shirts, which plaintiff, upon being called into the room, admitted she intended to take away, - she further stating that she thought them to be old and discarded shirts. Lanski retained the shirts. Late on the morning of April 1st, a man came in an automobile for plaintiff and her belongings, and, as plaintiff was leaving the house, Lanski's wife, noticing a package she was about to take away, demanded the right to examine its contents. Plaintiff became angry and rushed out with a portion of her belongings, and the door was closed. She demanded re-admission and said package, both

of which at first were refused her. She then became boisterous, kicked and pounded the door, endeavored to force an entrance and made so much of a disturbance that neighbors came. Finally the package was given her and she left, making threats that she would return and cause trouble to Lanski's wife. These occurrences so excited the latter that she telephoned her husband at the place where he was employed, and Lanski, in turn, telephoned a police station and requested that an officer be sent at once to his home. The complaint record kept at the station disclosed that about noon on said day Lanski complained that a man and woman were trying to break into his home and making a disturbance, and that officer Swain was detailed on the case. That officer immediately went to the home, had a conversation with Lanski's wife, and subsequently advised officers McNally and Owens of the information then received. On Saturday evening, April 2nd, McNally and Owens had a further conversation with Lanski and his wife, during which Lanski mentioned the occurrence regarding the silk shirts. The officers suggested that a prosecution for larceny be commenced against plaintiff, but Lanski said that he did not desire to institute any prosecution, as the shirts had been returned to him, and that he would not file any complaint against plaintiff. The officers, learning where plaintiff was, arrested her later in the evening without a warrant. On Sunday evening, April 3rd, Lanski was called to the police station and McNally and Owens insisted that he file a complaint against plaintiff, either for larceny or for disorderly conduct because of said disturbance, but he again refused to institute any prosecution, and on the following morning plaintiff appeared in court and was released.

The court gave to the jury eight instructions offered by plaintiff and five offered by defendants McNally and Owens, and also gave two stock instructions offered by Lanski as to plaintiff being required to establish her case by a preponderance

of the evidence, and as to the jury deciding the case upon the evidence and not upon appeals to their sympathy or upon statements of counsel made in argument which were not supported by the evidence. The court refused to give eight other instructions offered by Lanski, and we think that the ruling as to some of them was proper. There were three, however, which were framed according to Lanski's said theory of defense, sustained by evidence. They presented to the jury in substance the legal propositions that a person, believing that another person had participated in an unlawful disturbance, or had committed a larceny, or both, had the right, in good faith and without malice or sinister motive, to inform the police of such occurrences, and that if, as the result of such information so imparted, police officers, acting upon their own volition and contrary to the wishes of the person giving such information and without his active participation, thereafter unlawfully arrested and imprisoned said other person without complaint filed or warrant issued, said person giving the information will not be liable in damages to said other person so unlawfully arrested and imprisoned. We think that the court erred in not giving these instructions. It was Lanski's right to have the jury instructed according to his theory of defense, - it having a basis in the evidence upon which to rest. (Chicago Union Traction Co. v. Brady, 206 Ill. 615, 623; Chicago, etc. R. Co. v. Lewis, 109 Ill. 120, 134; Lemmon v. King, 95 Kan. 524, 529; Rich v. McInerny, 103 Ala. 345, 357.)

And we think that the amount of the verdict against Lanski, $10,000, is so excessive as to lead to the conclusion that the jury in rendering it were actuated by passion and prejudice. And the amount of the judgment, after the remittitur of $4,000, we consider also excessive. (Loewenthal v. Strong, 90 Ill. 74, 76.) Plaintiff was deprived of her liberty for less than two days. While she suffered inconvenience and distress of mind be-

cause of her arrest, her testimony as to whether she had difficulty in thereafter obtaining employment was uncertain and evasive. Lanski's uncontradicted testimony showed that he owned no property, that his sole income was his salary of $100 per week received from his employers, that he had a wife and two children to support, and that he paid as rental for his home $110 per month. In Walker v. Martin, 43 Ill. 508, 513, it is said: "A jury has the power, in a proper case, to visit a tort feasor with heavy damages, but it has no right to crush him. While great latitude must be and is allowed juries in all actions for personal torts, yet, it must be confined within some limits, no less for justice's sake than for the protection of the citizen." Counsel for plaintiff urge that the question of the excessiveness of the verdict, or judgment after the remittitur, cannot here be considered because Lanski did not assign any error thereon. Among the errors assigned are that the trial court erred (1) in denying Lanski's motion for a new trial and (2) in rendering the judgment. From an examination of his written motion for a new trial contained in the transcript we find that one of the reasons mentioned is that the verdict was "grossly excessive." We think that the question is properly before us. (Chicago, etc. R. Co. v. Northern Illinois Coal Co., 36 Ill. 60, 62; Ottawa, etc. R. Co. v. McMath, 91 Ill. 104, 112; Town of Cicero v. Bartelme, 114 Ill. App. 9, 13.)

For the reasons indicated we are of the opinion that the judgment of the Circuit Court should be reversed and the cause remanded for a new trial, and it is so ordered.

REVERSED AND REMANDED.

Fitch, P. J., and Barnes, J., concur.

298 - 29396

JOHN HAMILTON,
Appellant,

vs.

CITY OF CHICAGO and
CHARLES BOSTROM, its
Commissioner of Buildings,
Appellees.

236 I.A. 629

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County, dismissing a petition for mandamus, filed April 10, 1923, after a hearing upon the merits. The prayer of the petition was that said Commissioner of Buildings be commanded to forthwith issue to petitioner a building permit to erect a garage on a lot or parcel of land at the southeast corner of Paxton avenue and 68th street, Chicago, "in substantially the same form" and "of the same date," as that theretofore issued by him, or, in the alternative, "to restore to petitioner the permit which said Commissioner had theretofore pretended to cancel."

It appears that petitioner is the owner of the lot in question, which has a frontage of 99 feet on Paxton avenue (a north and south street) and a depth of 189-1/2 feet on 68th street (an east and west street); that the block in which the land is located is bounded on the north by 68th street, on the east by Grandon avenue, on the south by 69th street, and on the west by Paxton avenue; that on July 16, 1919, petitioner, without having obtained any frontage consents of any of the property owners in the immediate vicinity, applied for and secured a written permit, signed by the Commissioner, to erect a one-story garage, practically covering

the entire lot; that upon receiving protests against the granting of the permit, and upon investigation, the Commissioner, on October 10, 1919, and before petitioner had done any excavation or construction work, revoked and cancelled the permit and notified petitioner in writing to that effect; that petitioner did not thereafter take any appeal by way of arbitration or otherwise from the Commissioner's decision before instituting any suit, as provided by ordinance; that on October 22, 1919, petitioner started to make excavations for the proposed garage, and on the same day the work was stopped by a police officer under orders from the Commissioner; that on November 5, 1919, petitioner filed a bill in said Circuit Court for an injunction, praying that the City, its Building Commissioner and its Chief of Police, and their agents, etc., be enjoined from interfering with the erection of the garage; and that, after a full hearing before a master, the court, on July 14, 1922, entered a decree granting a perpetual injunction as prayed. From this decree an appeal was taken to this appellate court, where, on January 2, 1923, the decree was reversed and the cause remanded with directions to the circuit court to dismiss the bill for want of equity. (Hamilton v. City of Chicago, 227 Ill. App. 291.) In the opinion, after setting forth the facts as appeared from the evidence taken before the master, we held in substance that the injunction was erroneously issued, that petitioner's remedy, if any he had, was at law, and that his claimed right to construct the garage "can be fully tested by a mandamus proceeding to compel the Building Commissioner to issue a new permit in place of the one which was revoked." (p. 298). An application for a writ of certiorari was denied by the Supreme Court, and subsequently, and upon the mandate being filed, the Circuit Court dismissed the injunction bill.

On February 26, 1923, petitioner made written application to the Building Commissioner for a second permit to erect the proposed garage on the premises, but the Commissioner refused to issue the permit, and on April 10, 1923, petitioner filed the present petition for mandamus, to which respondents filed an answer. On the hearing before the court without a jury it was stipulated that the evidence taken before the master on the former hearing on the injunction bill might be introduced. Such evidence was introduced and additional evidence was also heard by the court.

It appears from the evidence, oral and documentary, that, when the present petition was filed in April, 1923, the west side of Paxton avenue from 67th to 68th streets, with the exception of four 50 foot lots, was improved with several occupied private residences; that the east side of said avenue between said streets was improved with two large apartment buildings, one of which extended along the avenue for about 200 feet and contained 42 flats for residence purposes; that on the east side of said avenue, between 68th and 69th streets and south of the proposed garage, there were four apartment buildings occupied for residence purposes, one of which fronted on 69th street; and that on the west side of said avenue, between 68th and 69th streets, there was one six-flat building occupied for residence purposes, and another flat building being in process of erection; that on the north side of 68th street, between Paxton and Crandon avenues and directly opposite the proposed garage, there was a six-flat building occupied for residence purposes, adjoining which on the east and extending to the corner of Crandon avenue there was a large apartment building, occupied for residence purposes. It further appears that, when petitioner's first application for a permit to erect the garage was made in July 1919, and when the permit granted was revoked in October, 1919, there was in force and effect a certain ordinance

On February 26, 1925, petitioner made written application to the Building Commissioner for a renewal permit to erect the proposed garage on the premises, but the Commissioner refused to grant the permit, and on April 10, 1925, petitioner filed the present petition for mandamus, to which respondents filed an answer. On the hearing before the court without a jury it was stipulated that the evidence taken [illegible] the matter of the former hearing of the injunction suit might be introduced. Such evidence was introduced and additional evidence was also heard by the court.

It appears from the evidence, and not [illegible], that, when the present petition was filed in April, 1925, the west side of Parker avenue from 67th to 68th streets, with the exception of the 50 foot lots, was improved with several detached private residences; that the east side of said street between said streets was improved with two large apartment buildings, one of which extended along the avenue for about 150 feet and contained 48 flats [illegible] residence purposes. [illegible] between 66th and 67th streets and [illegible] were four apartment buildings occupied for residence purposes, one of which fronted on 67th street, and that on the west side of said avenue, between 66th and 67th streets, there was one [illegible] building occupied for residence purposes, and another flat building [illegible] in presence of [illegible]; that on the north side of 68th street, between Parker and [illegible] avenues and directly opposite the proposed garage, there was a six-flat building occupied for residential purposes, adjoining which on the east and extending to the corner of [illegible] avenue was a [illegible] apartment building occupied for residential purposes. [illegible] In further support thereof, when petitioner's first application for permit to erect the garage was made in July 1923, and when the permit was revoked in October, 1923, there was in force and effect a certain ordinance

of the City, passed June 22, 1917, in part as follows:

> "It shall be unlawful for any person, firm or corporation to locate, build, construct or maintain any garage in the city on any lot in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, or within 100 feet of any such street in any such block, without securing the written consent of a majority of the property owners according to frontage on both sides of the street as provided by the ordinance of the City of Chicago."

It further appears that, before petitioner made his second application in February, 1923, for a permit to erect the garage, there had been passed, on November 22, 1922, what is known as the Chicago Municipal Code, in paragraph 246 of which the above provision as regards obtaining frontage consents is restated in substantially the same language, and there is also the added provision, as follows:

> "Such written consents shall be obtained and filed with the Commissioner of Buildings before a permit is issued for the construction of any such building, or before a license is issued for the operation of any public garage in any existing building; provided, that in determining whether two-thirds of the buildings on both sides of such street are used exclusively for residence purposes, any building fronting on another street and located upon a corner lot shall not be considered; and, provided, further, that the word 'block,' as used in this section, shall not be held to mean a square, but shall be held to embrace only that part of the street in question which lies between the two nearest intersecting streets."

After considering the evidence introduced on the hearing of the present case we have reached the conclusion that the court was fully justified in dismissing the petition and in so doing was not guilty of any abuse of discretion. It does not appear that petitioner ever obtained sufficient frontage consents for the erection of the proposed garage as provided by the garage ordinance of the city. And we think that petitioner's right to the writ, and the rights of the City, its Commissioner and the owners of the adjoining property, should be determined upon the conditions as they existed at the date of the filing of the peti-

tion for mandamus on April 10, 1923, at which time there were a considerable number of apartment buildings on both sides of Paxton avenue, between 63th and 66th streets, occupied for residence purposes, and the district in the immediate vicinity of the proposed garage was a residential one. Even if it be considered that petitioner's right to the writ should be determined under the conditions existing when the Commissioner issued the original permit in July, 1919, or when he revoked and cancelled it in October, 1919, we do not think that petitioner showed that he had a clear right to the writ, under the then existing ordinances of the City, and particularly the so-called "garage" ordinance, which petitioner's counsel contends is ambiguous. It is well settled that in doubtful cases the writ should not be granted. (Yates v. People, 207 Ill. 316, 327; People v. Blair, 292 Ill. 139, 144).

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Fitch, P. J., and Barnes, J., concur.

186 - 28841

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| L. F. CONRAD, doing business as the Imperial Heating Company, Appellant, | 236 I.A. 629 |
| v. | APPEAL FROM CIRCUIT COURT, COOK COUNTY. |
| KATHERINE A. WELLS, ET AL, Appellees. | |

Opinion filed December 24, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

L. F. Conrad, doing business as the Imperial Heating Company, filed his bill for a mechanic's lien on certain premises located in Chicago. Afterwards two other concerns who had furnished labor and material in the improvement of the premises intervened, claiming that they were also entitled to a mechanic's lien. After the issue was made up, the cause was referred to a master who took the proofs and made a report. He recommended that the claimants be given a mechanic's lien, but not as against the interests of all the defendants. The defendants filed objections to the report which were overruled, and they were ordered to stand as exceptions before the chancellor. The chancellor sustained the exceptions and a decree was entered dismissing the bill and the two intervening petitions. The complainant and the two intervening petitioners seek to reverse the decree.

The record discloses the premises in question are located at the southwest corner of Wabash avenue and 8th street in the City of Chicago, with a frontage of 120 feet on Wabash avenue and having a depth of 165.3 feet, extending to the alley,

and known as Nos. 800 - 810 South Wabash avenue, that Katherine Adams Wells, was the owner in fee simple of the premises and on the 23rd of April, 1918, executed a lease of the property to Ralph W. Olmstead for a term of ninety-nine years; that on July 12, 1920, Olmstead executed a lease whereby the premises were demised for a term of ten years to M. A. Levy. Both of the leases contained a provision requiring the tenants to make certain improvements and repairs on the premises and provided that at the termination of the lease, the improvements and repairs should become the property of the landlord.

Upon the execution of the lease from Olmstead to Levy, the latter took possession and began to make certain alterations and repairs in remodeling the building on the premises. He tore down the rear portion of the two story structure and erected in lieu thereof a fireproof structure across the rear end of the premises. He was engaged in this work on July 25, 1921, but being in need of money on that date, he borrowed $45,000.00 through Leo W. Hoffman. Before he would make the loan, Hoffman required Levy to organize a corporation known as the Film Exchange Building Corporation, to which Levy assigned all his interest in the lease he held from Olmstead, in payment of all of the stock of the corporation; 730 shares of the stock was issued to him personally and twenty remaining shares of the stock of the corporation was issued to the other members of Levy's family. Levy also assigned several leases he had made with tenants of the premises, to the Film Corporation. On the same day, July 25, 1921, the Film Exchange Building Corporation executed a

written instrument to Leo W. Hoffman, Trustee wherein it was stated it was the owner of the Levy Leasehold interest in the premises as well as the sub-leases made by Levy to the several tenants, and that the corporation was indebted in the sum of $45,000.00 to the legal owner and holder of the corporation's notes for that amount, and that to secure the payment of the $45,000.00 indebtedness the corporation "conveyed, granted, assigned, bargained, sold, transferred and set over" unto Leo W. Hoffman, Trustee, all of its interests in and to the leasehold estate as well as the sub-leases, except, the last day of the ten year term which Levy obtained from Olmstead, together with all the buildings and improvements or any improvements thereafter made. The corporation also "conveyed, granted, assigned, bargained, sold, transferred and set over" to Leo W. Hoffman, trustee, all rents, issues or profits due or becoming due by virtue sub-leases to said premises.

On August 14, 1921, Hoffman, trustee, wrote a letter to Levy authorising him to collect, in behalf of the trustee, all rents, arising out of the premises, which rents were to be turned over by Levy to Hoffman who was to apply them on account of the indebtedness. On the same day, August 14, 1921, Levy executed an affidavit to Hoffman, wherein it is set forth that Levy is the lessee named in the written lease from Olmstead to Levy, and that there was attached to and made a part of the affidavit a list of all the sub-leases made by Levy to various persons, firms and corporations of the premises in question. The affidavit further set up that there were no other leases on the premises; that these sub-leases had been assigned by

Levy to the Film Corporation and delivered to Hoffman, Trustee; that neither Levy nor the Film Corporation had given any rebates of any rent to any of the tenants; that there was also attached to and made a part of the affidavit a list of all persons, firms and corporations who had performed any work or labor or furnished material with a true statement as to whether such persons, firms or corporations had been paid and whether such claims were lienable; that there were no other claims for work or labor performed or material furnished except those mentioned in the list. The affidavit further set up that Levy made it in behalf of the Film Exchange Building Corporation and in his own behalf. It then set up a list of persons, firms or corporations who had claims for labor performed and material furnished; that Levy would within a reasonable time execute and deliver to the person who had against the premises either by himself, by the Film Corporation or both notes evidencing such claims and that upon the payment of the notes he would secure from them waivers of liens. The affidavit further set up that Levy made it for the purpose of inducing the holder of the $45,000.00 note to loan that amount to the Film Corporation and "that he is the owner of Seven Hundred Thirty (730) shares of the Seven Hundred Fifty (750) shares of the capital stock of said Film Exchange Building Corporation and that said loan has been made to said corporation."

On September 21, 1921, Levy wrote a letter to complainant, as the Imperial Heating Company, directing him to change and place radiators in the premises in question at a certain stated rate of wages for the men employed. Com-

plainant proceeded to do the work as ordered by Levy and it was completed the latter part of October 1931; the total cost being $1630.50, of which he was paid $700.00, leaving a balance claimed to be due of $930.50.

On or about October 13, 1931, Levy entered into an oral contract with theintervening petitioner, the Altizer Elevator Company for the repairing of the elevators in the building. This work was done by the Elevator Company and completed about April 27, 1932.

On November 9, 1931, more money being needed to complete the improvements on the premises, Levy on that date made another affidavit which he delivered to Hoffman wherein he stated that he had made the affidavit of August 14, 1931, above referred to, and that the list attached to the first affidavit showing the persons who had claims for labor performed and material furnished was correct as of November 9, 1931. The affidavit further set up that Levy made it for the purpose of inducing the legal holder of certain notes, aggregating $12,000.00, all of which were executed by the Film Corporation, to loan to the Film Corporation the $12,000.00; that seven hundred and thirty of the seven hundred and fifty shares of stock of the Film Corporation were owned by Levy and the other twenty shares were controlled by him.

On or about November 16, 1931, Levy entered into an oral contract with the O. H. Hill Company, the other intervening petitioner, to install steel doors in the premises. The work was completed on or about March 23, 1932. For this

work there was due $1643.00.

The evidence shows that there is still due and owing to the complainant Conrad $913.50; to the Altizer Elevator Mfg. Co. $268.13 and to O. H. Hill Company $1643.00. And there is no dispute but that complainant and the two intervening petitioners would be entitled to a lien for the amount of their respective claims if the owners authorized or knowingly permitted the work to be done.

The undisputed evidence is that on July 25, 1921, and prior thereto, Levy was remodeling and improving the building located on the premises in question and that he continued to do so until the spring of 1922; that on July 25, 1921, when Levy wanted to borrow money with which to pay for the alterations and improvements, he was making on the building, Hoffman required that the Film Corporation be organized before the money would be loaned; that that corporation was formed, and that Levy turned over his leasehold interest in payment of all the stock of the corporation, 730 of the shares being issued to him and the twenty remaining shares to other persons whom he designated. He was president of the corporation, as appears from the fact that when he assigned his interest in the lease to the Film Corporation, the corporation's name was signed by himself as president and on the same day when in turn the Film Corporation assigned its interest to Hoffman, trustee, the lease was executed on behalf of the corporation by himself as its president. The evidence further shows that when Levy made the affidavits and delivered them to Hoffman on August 4, 1921, and November 9, 1921, he swore that he made the affidavits on behalf of himself as well as

on behalf of the corporation, and in these affidavits he deposes and says that he still owns 730 shares of the Film Company's stock.

On the hearing before the master, Levy testified that after the assignment of the leasehold interest to Hoffman, and until all of the work of altering and repairing the building was completed, he conferred two or three times a week with Hoffman in reference to the matter. Hoffman denies that Levy said anything to him about any work being done on the premises by the complainant or the two intervenors, and he gave other testimony to the effect that the only work that Levy was authorized to do in connection with the premises was the completion of any work remaining undone as shown by the itemized statement attached to Levy's affidavit. There is no evidence in the record that Levy was given any instructions in reference to any of the items mentioned in his affidavits.

Upon a careful consideration of all of the evidence in the record, we think it is clear that after July 25, 1921, when Levy and the corporation assigned there respective interests in the leasehold estate, that Levy continued in charge and control of he completion of the remodeling of the building, and that his authority after that date was not limited to the collection of the rents for Hoffman, Trustee. It therefore, follows, that the interest of Katherine A. Wells, the owner of the fee and who executed the ninety-nine year lease on the premises, which required the tenant to make certain improvements, makes her interest subject to the lien of the complainant and the two intervenors. Carey-Lombard

Lumber Co. v. Jones, 187 Ill. 203. A similar provision was in the lease from Olmstead, the lessee named in the ninety-nine year lease to Levy, but his interest cannot be effected as he was not served in the case. Levy having assigned all of his interest to the Film Company, no lien can attach, nothing remaining in him. But the interest of the Film Corporation is subject to the lien, because it knowingly permitted the improvements to be made. They were done under the direction of its president. The interest of Hoffman, trustee, is also subject to the lien, because it is clear that after the assignment to him by the Film Corporation, the alterations of the building continued to be in charge of Levy, who was acting for him, so that notice to Levy would be sufficient to bind Hoffman.

The defendants by their counsel state that the master and the chancellor both found that Hoffman, trustee, did not authorize the work for which claimants seek liens and that their contracts were with the defendant Levy only; that he had assigned all of his interest in the premises to the Film Corporation. We have been unable to find any finding by the master to the effect that Hoffman, trustee, did not authorize the work to be done. The chancellor found that none of the defendants, Wells, Olmstead, the Film Corporation, Hoffman, trustee, or Cohen, the owner of the $57,000.00 indebtedness, contracted for, authorized or knowingly permitted the work to be done or the material furnished for which complainant or the intervenors seek liens. We think the finding of the chancellor is contrary to all the evidence. Levy was not a mere interloper, but continued in charge of the alterations and improvements which were being made on the premises after the assignment

of the lease to Hoffman, trustee, and whether Hoffman authorized the work, or actually knew that it was being done is immaterial, because he is bound by the acts of Levy whom he knew and permitted to continue in charge. But the defendants say that there is no allegation in the pleading that Hoffman, trustee, knowingly permitted the work to be done. It is alleged in the amended bill of complaint that while the contracts made with the complainant and the two intervenors were in the name of Levy, they were in fact the contracts of Hoffman, trustee. We think this allegation on the record before us is sufficient. It is also contended that there was no allegation in the pleadings nor evidence offered to show that the Film Company either contracted for, authorized or knowingly permitted the work in question to be done and that no relief is prayed for against the Film Corporation. The bill might not be considered a model of equity pleading, but it sets up sufficient facts and the evidence is clear that the Film Corporation knew the work was being done and no complaint was made on the hearing that the evidence offered was not warranted by the pleading. Relief might be properly granted under the general prayer for relief. Casstevens v. Casstevens, 227 Ill. 547.

The decree of the Circuit Court of Cook County is reversed and the cause remanded with directions to enter a decree in favor of the complainant and the two intervenors, giving them liens for the amounts of their claims on the interests of Katherine A. Welk, the Film Exchange Building

Corporation and Leo W. Hoffman, trustee.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMSON, J. and TAYLOR, J. CONCUR.

236 - 26884

JACOB HORNITZ,

Appellee,

v.

CENTRAL MATTRESS COMPANY,
a corp.,

Appellant.

236 I.A. 629

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed December 24,1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $161.75, claiming that sum was due under the terms of a written lease by reason of repairing a garage which was occupied by the defendant as tenant of the plaintiff. There was a finding and a judgment in favor of the plaintiff for the amount claimed and the defendant appeals.

Plaintiff's amended statement of claim on which the case was tried set up that the parties entered into a written lease whereby plaintiff demised to the defendant a garage and storage room for a term of three years beginning the 15th day of December, 1921, and terminating the 14th day of December, 1924, at a rental of $25.00 per month. The written lease was made a part of the plaintiff's statement of claim, and it was there alleged that the defendant damaged the garage by breaking the doors, windows, damaging the lights and wiring in the garage, as well as damaging the walls and the foundation of the garage, all of which were alleged to be in violation of a covenant in the lease. The covenant de-

clared upon required the tenant during its occupancy of the premises "to maintain and keep the same in as good condition" as the premises were when possession was taken, ordinary wear and tear, etc. excepted. It was further alleged in the statement of claim that plaintiff made demand upon the defendant to remedy the damage which the defendant had caused to the garage, but that the demand had been refused. The defendant in its affidavit of merits denied that it broke the doors or windows or damaged the premises as plaintiff alleged and averred that none of the repairs made by plaintiff were rendered necessary by any act of the defendant.

It appears that defendant took possession of the garage on or about the 15th day of December, 1931, and kept a truck which was used in the conduct of its business, in the garage, and, that it has continued to so occupy the garage since taking possession; that about April, 1932, as plaintiff contends, or October of that year as the defendant contends, the doors opening into the garage and the frame of the door were damaged and broken. Plaintiff took the position and offered evidence to sustain his position that the defendant in operating its truck struck the side of the door and caused the damage. On the other hand the defendant's position is that the damage to the garage was caused by plaintiff's horse and wagon which were left standing in the alley near the garage, and that the horse in attempting to draw the wagon into the garage struck the side of the door.

The evidence shows that the door to the garage was about 7½ or 8 feet wide prior to the time the garage was

damaged; that afterwards plaintiff took out a part of the wall so as to make the door 18 feet wide, and this necessitated the changing of some of the electric wiring, and that the cost of all of this was $161.75; that after the work was done, plaintiff demanded that the defendant pay this amount, but the demand was refused. Plaintiff also offered evidence tending to show that after the garage was damaged, he requested the defendant to repair it, and that the defendant finally stated that if the plaintiff would repair the damage, the defendant would pay the cost of the repairs.

On the trial of the case when this evidence was offered, the defendant objected on the ground that it had come prepared to defend the case made by plaintiff's statement of claim, which alleged a breach of the written lease; that this evidence tended to establish an oral independent contract and was not within the pleading and that he was taken by surprise. The court overruled the objection and refused to continue the case and admitted the evidence. This evidence was admissible as tending to show that the defendant had damaged the garage, but it was not offered on this theory. It was at variance with the plaintiff's statement of claim and should not have been admitted. Although this is a fourth class case in which plaintiff's statement of claim is sufficient if it sufficiently informs the defendant of the nature of plaintiff's claim, yet in such a case, plaintiff cannot allege one state of facts andprove a different state of facts. But even if we assume that the evidence was properly admitted, we think the finding of the trial court to the effect that defendant agreed to pay for the cost of the alter-

ations made by plaintiff is against the manifest weight of the evidence. Plaintiff testified that when he spoke to the representative of the defendant about making the repairs and widening the door; that the representative agreed to this because if the door was not widened the defendant would probably damage it again by striking the side of the door with his automobile. This was denied by defendant's representative. It seems clear to us that it would be most unreasonable that the door should be widened from 8 to 18 feet in order to enable the defendant to properly run his truck in and out of the garage. We are also clearly of the opinion that the evidence is amply sufficient to sustain the finding of the court to the effect that the defendant damaged the garage by striking the side of the door with the truck, and that under the statement of the case as made, the defendant would be liable for the reasonable expense of repairing the damage which it did. There is some evidence on behalf of the defendant tending to show that this expense would be from $20.00 to $25.00, but it is not sufficient for us to enter a judgment here. We, therefore, hold that plaintiff is entitled to recover the reasonable cost of repairing the damages done by the defendant, but that plaintiff is not entitled to recover for widening the door 10 feet and changing the lights.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, J. AND TAYLOR, J. CONCUR.

248 - 28906

JOHN HULLA,

Appellant,

v.

PHILIP LAUTENSCHLAGER,

Appellee.

236 I.A. 629

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed December 24,1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover a balance of $1510.03 with interest thereon at five percent per annum from December 1, 1912, making a total of $2160.03, claimed to be due him for material furnished and labor performed in the construction of a moving picture theatre building. At the close of the plaintiff's evidence, there was a directed verdict for the defendant and plaintiff appeals.

The defendant's position was that he had paid plaintiff in full, the last payment having been made nearly ten years before the suit was brought.

Plaintiff in his statement of claim allaged that he entered into a written contract with the defendant on the 26th of January, 1912, whereby plaintiff was to erect for the defendant a moving picture theatre building at a cost of $27,400.00 in accordance with certain written plans and specifications. He further alleged that on March 4, 1912, the parties entered into a supplemental written agreement,

Opinion filed December 24,1924.

whereby plaintiff was to raise the roof of the building, for which he was to be paid by the defendant $2,000.00. It is further alleged that on the 12th of September, 1912, a further agreement in writing was entered into by the parties, whereby plaintiff was required to do certain other extra work in connection with the construction of the building for which he was to be paid $500.00. The statement of claim then set up that afterwards plaintiff was required to do certain other extra work in and about the construction of the building for which defendant orally agreed to pay the fair, reasonable prices. This extra work the statement of claim shows consisted of six different items and the dates and amounts due. It is then alleged that the total cost of the building as agreed upon between the parties, was $30,178.74, and that the defendant was entitled to credits aggregating $28,668.71, leaving a balance due of $1510.03, with interest as above stated, and that the six items of extra work referred to in the oral agreements had been paid in full. Attached to and made a part of the statement of claim was the written contract, the specifications and the two written supplemental contracts, as well as a statement of the account between the parties, showing the several credits which plaintiff had given the defendant. The statement of claim also contained a paragraph, claiming the amount for which plaintiff sued was due on an account stated between the parties on December 1, 1912.

The defendant filed an affidavit of merits which set up the five years Statute of Limitations to the paragraph

whereby plaintiff was to raise the roof of the building, for which he was to be paid by the defendant $8,000.00. It is further alleged that on the 12th of September, 1911, a further agreement in writing was entered into by the parties, whereby plaintiff was required to do certain other extra work in connection with the construction of the building for which he was to be paid $800.00. The statement of claim then set up that afterwards plaintiff was required to do certain other extra work in and about the construction of the building for which defendant really agreed to pay the sum, reasonable values. This extra work the statement of claim then consisted of six different items and the dates and amounts due. It is then alleged that the 10th day of the building as agreed upon between the parties, was the 20th, 1912, and that the defendant was entitled to credits amounting $[illegible]. Leaving a balance due of $[illegible]. This action was commenced on the [illegible] day of [illegible], 1912, and the claim of the plaintiff was [illegible] in full. Attached to and made a part of the statement of claim was the written agreement, the specifications and the [illegible] [illegible], as well as a statement of the account between the parties, showing the several credits which plaintiff had given the defendant. The statement of claim also contained a paragraph, claiming the amount for which plaintiff said he was on an account stated between the parties on December 1, 1912.

The defendant filed an affidavit of merits which set up the first three clauses of the defence to the paragraph

of the statement of claim which declared upon an account stated. It further set up that no account had been stated on December 1, 1912, and that the defendant was not indebted to the plaintiff in any sum. On the trial of the case it was agreed by counsel, that the record show that defendant's affidavit of merits be amended so as to show that the entire amount called for by the written contract, viz. $27,400.00 had been paid for in full.

Plaintiff testified in his own behalf, identifying the several written exhibits attached to his statement of claim and they were received in evidence.

This is substantially all the evidence which was offered and it seems to have been conceded that plaintiff constructed the building in accordance with the plans and specifications. It was also conceded that the $2,000.00 and the $500.00 mentioned in the two written supplemental contracts had been paid in full as shown by plaintiff's statement of credits attached to his statement of claim. There was considerable discussion before the court as to whether payment by the defendant was an affirmative defense which required proof on behalf of the defendant. At the close of the plaintiff's case the defendant moved for a directed verdict and the court indicated that he would allow the motion when the defendant asked leave to introduce more evidence to the effect that the statement of account attached as an exhibit to his statement of claim showed all that he had been paid by the defendant and further that plaintiff had made demand on the defendant for the balance which he claimed during the year 1913 and succed-

ing years and that the defendant had never claimed that he did not owe the balance on the contract sued for to plaintiff. The court denied plaintiff's motion and sustained defendant's motion for a directed verdict. Judgment was entered upon the verdict and this appeal followed.

Plaintiff's position is that under his pleadings he was entitled to a verdict in his favor for the amount of his claim in the absence of any proof made by the defendant showing that he had paid plaintiff in full. With this contention we cannot agree, because upon a careful analysis of plaintiff's pleading, it is impossible to say what sum, if any, is due plaintiff. Plaintiff contends that his statement of claim shows the entire cost of the building was $30,178.74. This is not borne out by the record, but is, contrary to it. The original contract price was $27,400.00. The specifications attached to and made a part of the contract shows how the building was to be constructed in detail, but does not give the cost of the various items therein mentioned, except that it does show that plaintiff was to put seats in the theatre for which he was to be paid by the defendant $1000.00. The supplemental contract of March 4, 1913, which provided for extra work and material, and by which the plaintiff was required to raise the roof of the building and for which he was to be paid $2,000.00, expressly provides that $1,000.00 of this is to be paid by omitting the seats. So that the entire cost, according to plaintiff's pleading, would be $28,178.74, and not the amount as contended for by plaintiff. The explanation made by plaintiff's counsel of certain payments made by the defendant as shown by the exhibit

jury found that the defendants had never claimed that he did not owe the balance on the contract and that he plaintiff. The court denied plaintiff's motion and overruled defendant's motion for a directed verdict. Judgment was entered upon the verdict and this appeal followed.

Plaintiff's position is that under the pleadings he was entitled to a verdict in his favor for the amount of his claim in the absence of any proof made by the defendants showing that he had made plaintiff in fact. With this come tention we cannot agree. Because upon a careful analysis of plaintiff's pleadings, it is impossible to say that any, if any, is due plaintiff. Plaintiff contends that his statement of claim shows the entire cost of the building was $20,[illegible]. This is not shown by the record, nor is plaintiff so it. [illegible] The defendants contend that the [illegible] that since the building was not in a condition to be occupied in the fall, but then was when [illegible] the action [illegible] continued, though [illegible] not [illegible] put away in the drawer for which he was to be paid by the [illegible]. The defendants contract of March 6, 1923, with respect to [illegible] in dispute, and it [illegible] the plaintiff [illegible] required to raise the roof of the building [illegible] the week of [illegible], approximately previous that $1,[illegible] of this is to [illegible] by omitting the [illegible] to that the [illegible] contrary to plaintiff's pleading [illegible] $20,[illegible], and not the amount as contended for by plaintiff. The contention made by plaintiff's counsel of [illegible] statements made by the defendant as shown in the opinion

attached to the statement of claim, is not warranted by the record. This statement shows that on December 21, 1912, plaintiff gives the defendant credit of $115.00, which it is stated was "35.00 bal. on contract 80.00 extra painting auditorium instead of calcimine". The specifications show the interior walls were to be calcimined but that the walls were painted, but it cannot be determined from the account whether any allowance has been made the defendant by reason of the fact that plaintiff was not required to calcimine. Another item which is credited to the defendant is said to be for payment to George G. Cappenter for flag poles, and this is claimed as an extra by the plaintiff, but on looking into the specifications, we find that there is a provision there for three flag poles. In the absence of any evidence, we cannot say that the $24.50 was for extra work and material furnished, but the contrary appears to be the fact. Another item for which plaintiff gave the defendant credit, is $63.30, of which he applies $48.30 on account of contract and $15.00 for extra in putting in tile instead of cement. Here again it does not appear whether the defendant has been given any credit for the omission of the cement. A number of other items might be picked out of the same character, but we think it would serve no useful purpose to do so. On the other hand, defendant contends that the account shows that plaintiff has been paid in full, and this nearly ten years before the suit was brought; that some of this is shown by the fact that on September 12, 1912, the record shows that there was a settlement for all extras in full for $500.00.

It appears from plaintiff's statement of claim that two of the extra items set up and for which plaintiff claims work and material was furnished November 1, 1912, and for which he claims $15.00 and November 5, 1912, for which he claims $89.24, that these two items were acknowledged to have been paid by him as shown by his account on October 10, 1912.

Upon a careful examination of the record, it appears that plaintiff's method of keeping the account showing the credits he gave defendant was not very accurate and that in analyzing it several years after the building had been completed and the last payment made, he became confused and thought there was something remaining unpaid, and this is the basis of his suit.

There is no mention in the pleadings nor was there upon the trial that plaintiff had ever made any demand on the defendant for payment of the balance covering a period of nearly ten years. The only thing that appears from the record is that after the court had indicated that he would direct the jury to return a verdict for the defendant, his counsel wanted to prove that demand had been made in the year 1913 and succeeding years. Upon a careful consideration of the entire record, we are of the opinion that the court was right in directing a verdict and entering a judgment upon it.

The judgment of the Municipal Court of Chicago is, therefore, affirmed.

JUDGMENT AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

In response from Jason Hill's statement of claim that one of the extra items set up was for which plaintiff claims work and material was furnished November 1, 1912, and for which he claims $18.00 and December 5, 1912, for which he claims $90.00, that these two items were acknowledged to have been paid by him as shown by his account on October 10, 1913.

Upon a careful examination of the record, it appears that plaintiff's method of keeping the account showing the months he gave defendants was not very accurate and that in analyzing at several years after the building had been completed and the last payment made, he became confused and thought there was something remaining unpaid, and that in the heats of his suit.

There is no question in the pleadings but was there upon the trial that plaintiff had ever made any demand on the defendant for payment of the balance covering a period of nearly ten years. The only thing that appears from the record is that after the suit had indicated that he would direct the jury to return a verdict for the defendant, this counsel wanted to prove that demand had been made in the year 1913 and preceding years. Upon a careful consideration of the entire record, we are of the opinion that the court was right in directing a verdict and entering a judgment upon it.

The judgment of the municipal court of Dubuque is therefore affirmed.

MCCLAIN AND KENNEDY.

DENNEGAN, J. AND FAHEY, J. CONCUR.

258 - 28916

THE WENGER- ARMSTRONG CORPORATION,

Appellee,

v.

CHARLES W. PETERS, Sheriff of Cook County, and Bell Oil and Gas Company, a Corporation,

Appellants.

236 I.A. 630

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed December 24, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of replevin against Charles W. Peters, as Sheriff of Cook County and the Bell Oil and Gas Company, a corporation, to recover possession of a carload of gasoline. The Coroner was unable to obtain the car, but he served the defendants personally and the case became one of trover. Esch v. Dillon, 230 Ill. App. 602. There was a verdict and judgment in plaintiff's favor for the value of the gasoline - $1693.75, to reverse which the defendants prosecute this appeal.

So far as it is necessary to state the facts as they appear from the record, they are: that the Martin Oil & Refining Company operated a refinery at East Chicago, Indiana and was also engaged in the buying and selling of gasoline. In the early part of June, 1922, the Martin Company sold a number of cars of gasoline to the defendant, the Bell Oil & Gas Company, some of which were delivered to the Bell Company's customer, the Bensoline Company.

The Bensoline Company rejected some of the cars, claiming that the gasoline was not of the quality which it had purchased, and accordingly, the rejected cars, including the one in question were returned by the Bell Company to the Martin Company's plant at East Chicago for the purpose of having the gasoline brought up to a higher quality. While the car was at the Martin Company's plant, the Bell Company sold it to the plaintiff, describing the car as M P R X 872. The Martin Company also sold the contents of this same car to the plaintiff and upon the plaintiff's order, the car was shipped to its customer George C. Peterson Company; the car being forwarded to the latter company at the Avondale Station, Chicago. When the Bell Oil Company learned that the car was being sent to the Peterson Company at Chicago, they brought an action of replevin against that company. Sheriff Peters took the car on the writ and delivered it to the Bell Oil Company who later sold it to one of its customers. When the plaintiff company learned that the car had been taken on the writ of replevin, it commenced the present action of replevin against the Sheriff and the Bell Oil Company.

Practically the sole question that was contested on the trial of the instant case was whether the gasoline which had been rejected by the Bensoline Company had been all taken out of the car by the Martin Company after it had been returned to the Martin Company's plant and different oil put into the car, or whether the Martin Company had taken but 2,000 gallons from the car and then put in 2,000 gallons of other gasoline in order to improve the quality of the entire car. It seems to have been the theory of both parties on the trial that if

The Bland-Ink Company replaced some of the cans, claiming that the question was not of the quality which it had originally claimed, but accordingly, the replaced cans, including the small in question were returned by the Bell Company to the Martin Company's plant as that company for the purpose of having the quality brought up to a higher quality. While the cans were at the Martin Company's, the Bell Company sold it to the plaintiff, supposing the cans to be a 1 2 3 ink. The Martin Company also sold the contents of this same can to the plaintiff and upon the plaintiff's order, the can was delivered to the customer Joseph C. Patterson Company, and being forwarded to the latter company at the Jackson Station, Illinois. When the Bell Oil Company learned that the can was being sent to the Patterson Company as Blackout they brought an action of replevin against that company.

Gherrit Pepper took the case to his wife and delivered it to the Bell Oil Company who later sold it to one of its customers, from the plaintiff, having learned that the can had been taken on the writ of replevin. It commenced the present action of replevin against the Gherrit and the Bell Oil Company.

Successfully the other defendants that was contracted in the trial of the Patterson case, Mr. Pepper, in particular, which had been replaced in the Bland-Ink Company and been all taken out of the can in the Martin Company after it had been returned to the Martin Company's plant and different oil put into the can, or whether the Martin Company had taken but 5,000 gallons from the can and then put in 1,000 gallons of other product in order to improve the good by of the engine can. It seems to have been the theory of Bell Company in the trial that it

the contents of the car had been entirely removed by the Martin Company and different gasoline put into the car, then plaintiff would be entitled to recover, but on the other hand, if it was found that but 2,000 gallons of gasoline had been removed and a like quantity of different gasoline put into the car, then the verdict should be for the defendant. This was the question submitted to the jury as shown by instructions given, and as appears from an examination of the entire record in the case.

Counsel for the Bell Company stremuously contends that the finding of the jury in favor of the plaintiff to the effect that all of the gasoline had been removed and different gasoline put into the car is against the manifest weight of the evidence.

J. L. Clubb, a witness for the plaintiff, testified that at the time in question, he was employed by the Martin Company at its plant at East Chicago and that he took out the entire contents of the car after it had been rejected by the Bensoline Company, and then he filled the car with other and different gasoline. On the other hand William Hildebrandt testified for the defendant that he was employed by the Martin Oil Company and that he withdrew from the car but 2000 gallons of gasoline and put into the car a like quantity of different gasoline, so as to improve the quality. Other evidence was offered tending to support each side of this question, but after a careful consideration of all the evidence, we are unable to say that the finding of the jury, sustaining plaintiff's theory of the case, is against the manifest weight of the evidence. In these

circumstances, we would not be warranted under the law to disturb the verdict of the jury.

2. The defendant further contends that the judgment is wrong and should be reversed, because the undisputed evidence shows that prior to the institution of the instant case, plaintiff had sold and delivered the car to the George C. Peterson Co. and, therefore, having no interest in the gasoline, could not maintain the action because in an action of replevin, plaintiff must recover upon the strength of his own title or his right to possession and not on the weakness of his adversary. We think the law is as contended by counsel for the defendant, but we are also of the opinion, that the question is not properly before us, because upon the trial, when evidence was offered on behalf of the defendant, tending to show that title to the gasoline in question was in the Peterson Company, counsel for plaintiff objected that this was inadmissible under the pleadings. His view was sustained by the court and the ruling was acquiesced in by the defendant. When the defendant offered in evidence the purchase order, the sales order and the invoice passed between plaintiff and the Peterson Company, objection was made by the plaintiff that if it was sought to show by them that title to the car of gasoline had passed from plaintiff to the Peterson Company, they would be inadmissible under the pleadings filed by the defendant, and the record shows that these documents were offered and received in evidence for the sole purpose of showing the quality of the gasoline and no complaint was made in the trial court nor is any made in this court that the ruling of the learned trial judge was incorrect.

Alternatively, we would not be warranted under the law to disturb the verdict of the jury.

II. The defendant further contends, that the judgment is wrong and should be reversed, because the undisputed evidence shows that prior to the institution of the instant suit, plaintiff had already filed an action in the Superior Court of Cook County, Illinois, which is material in the present, since in relation its action lessened in no notion of verdicts, plaintiff must recover upon the strength of his own title or his right to possession and not on the weakness of his adversary. In fact the jury is so instructed by defendant for the defendants, but on the plea of the opinion, that the evidence is not properly before us, because upon the trial, when evidence was offered on behalf of the defendants, tending to show that title to the premises in question was in the Interest Company, counsel for plaintiff objected that this was incompetent under the pleadings. The fact was conceded by the court and the ruling was maintained in the defendant. When the defendants offered to introduce the judgment order, the order order and the transcript showed having plaintiff and the Veterans Company, objection was made by the plaintiff that it was enough to show by that that title to the car of premises had passed from plaintiff to the Veterans Company, they sought to introduce under the pleadings filed in the Interest, and the record shows that these documents were offered and received in evidence for the sole purpose of showing the ruling of the pleadings and be completed was made in the final decree and is supported in this court that the ruling was correct.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

267 - 28925

PEDRO LOMBARDASCO,

Appellee,

v.

NORTHERN PACIFIC RAILROAD COMPANY,

Appellant.

236 I.A. 630

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed December 24, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $62.12, which he had paid for railroad transportation from Pasco, Washington to St. Paul, Minnesota, claiming that the defendant hired him to work as a laborer in Washington and agreed that if he should continue to work for the defendant for six months or more, it would give him free transportation to St.Paul; that he worked for more than six months for the defendant, but that it refused to give him free transportation and he was obliged to pay $62.12, for his railroad transportation to St. Paul. There was a finding and judgment in his favor for the amount of his claim and the defendant appeals.

Plaintiff in his statement of claim alleges that on the second of April, 1920, he was employed at St. Paul, Minnesota by the defendant railroad company to work as a track laborer at Pasco, Washington; that at that time it was agreed that if plaintiff should remain in the employ of the

defendant for six months or longer, the defendant would give him free transportation back to St. Paul; that plaintiff worked for the defendant for more than six months, but that the defendant refused to give him transportation and he was obliged to pay for the same.

Plaintiff testified that he lived in Chicago; that in the early part of 1920, a gang of men of whom he was one were employed by the Chicago, Milwaukee & St. Paul R. R. Co. to work for that company in the State of Washington; that the Milwaukee Company at the time of thehiring agreed that in case the men worked for more than six months for it, they would be given free transportation; that a gang of men went to the State of Washington and worked for a short time for the Milwaukee Railroad and there left that Company and were employed by the defendant, the Northern Pacific Railroad Co.; that he first saw the defendant's roadmaster, Peter Anderson at Pasco, Washington before he went to work for the defendant Company and that before taking their tools to go to work at that place he asked Anderson what about the defendant company issuing him a pass in case he worked for six months or more for it; that Anderson replied that it was a rule of Company that men who work six months or more would be given transportation from Washington to St. Paul, Minnesota; that thereupon plaintiff went to work for the defendant company; that after working for more than six months, he with other men were laid off, and then asked Anderson for a pass to St. Paul, but the latter refused. The evidence further discloses that James Aveno was foreman of the gang of men which numbered fifty-five, that was hired by the St. Paul Railroad Company

discharged for six months or longer, the defendant would give him free transportation back to St. Paul; that plaintiff did worked for the defendant for more than six months, but that the defendant refused to give him transportation and he was obliged to pay for the same.

Plaintiff testified that he lived in Minnesota that in the early part of 1909, a gang of men he was one were employed by the Minneapolis, Minneapolis & St. Paul R. R. to work for that company in the State of Washington; that the Minneapolis Company at the time of obtaining agents that in some the men worked for were from six months for it. They would be given free transportation; that a gang of men went to the state of Washington and worked for a short time for the Minneapolis Railroad and there left that company and were employed by the defendant, the Northern Pacific Railroad Co.; that he, Hand was the defendant's machinist, being advanced at month. Washington before he went to work for the defendant and Company and that before getting their work to go to work it that place he signed agreements that stated the defendant company hauling him a pass to go to work for six months or more for 15; that agreement notice that it was a rule of Company that men who work six months or more would be given transportation from Washington to St. Paul, mentioning that therefore plaintiff went to work for the defendant company that after working for more than six months, he with other men were "laid off", and then walked Andrews for a pass to St. Paul, but the latter refused. The evidence further discloses that there were two groups of the gang of men which numbered fifteen, all men hired by the St. Paul Railroad Company

in Chicago and went to Washington.

George Aveno, the foreman's brother testified for the plaintiff that he was a member of the gang employed by the Milwaukee Railroad; that he went from Chicago to Ellensburg, Washington, where they all worked for that company for a short time; that at that place the witness and his brother, the foreman of the gang met Anderson, the roadmaster of the defendant company and, after some conversation between Anderson and the gang foreman, it was agreed that if the men left the Milwaukee Company and went to work at Pasco for the defendant company and if the men remained with the defendant railroad for six months or more, they would be given a pass back to St. Paul; that the men then went from Ellensburg to Pasco and worked for the defendant company; that after they had worked about three days for the defendant company, Anderson was passing the place where the men were working and the men asked him if it were true that they were to be given passes to St. Paul after six months' work, and that Anderson replied that they would be given passes if they worked for six months or more; that plaintiff was present at that time and spoke to Anderson about the matter; that about five of the men were given passes upon exhibiting telegrams that there was an illness in their families at home.

Angelo Pewnisi, testified for the plaintiff that he was a member of the gang that went from Chicago to Washington; that he saw Anderson at the place they were working for the defendant railroad company in Washington and that Anderson said that the men would be given a pass after six months. On cross-examination, he testifiedthat he first saw Anderson at

Ellensburg.

Michael Vucinno also testified that he was at Pasco with the other men working for the defendant; that he knew Anderson, the roadmaster; that he first saw him at Ellensburg, while the witness was working for the Chicago, Milwaukee and St. Paul Railroad Co.; that at that time he heard a conversation between plaintiff and Anderson; that Anderson there said that if plaintiff and the men worked for six months for the defendant, he would see that they got a pass back to St. Paul; that they would not be given passes to Chicago, because the defendant had no railroad going to that point.

Michael Travino for the plaintiff, testified that he was one of the gang working at Ellensburg and heard a conversation between plaintiff and Anderson, the defendant roadmaster, which took place at Pasco; that plaintiff asked Anderson about receiving a pass after six months' work; that Anderson replied, "Boys, if you work all the summer after six months you get the passes."

For the defendant, H. C. Rupple, testified that he was Division Roadmaster of the Pasco Division, that Anderson was District Roadmaster, the latter having charge of 70 miles of main line and 140 miles of branch line; that Anderson's duties were to superintend the work; that he might employ a single laborer, but that he had no authority to employ extra gangs or foremen; that the witness employed the gang of men through their foreman, James Aveno, at his office in Pasco; that Aveno came to him and said that they wanted to leave the

[illegible]

[illegible] Jackson also mentioned that at one of

[illegible] were waiting for the [illegible]. Just

[illegible], the [illegible], that he first saw him at

[illegible], while the [illegible] was waiting for the [illegible],

[illegible] and [illegible] [illegible] as [illegible] [illegible]

heard a conversation between [illegible] and Anderson. [illegible]

[illegible] there said that if [illegible] and the men worked for

[illegible] [illegible] for the defendants, he would see that they got a

fair [illegible] to do. Said, that they would not be given [illegible]

[illegible], because the defendants had no [illegible] going on

[illegible].

[illegible] Jackson [illegible] the [illegible] [illegible] that

he was one of the [illegible] [illegible] [illegible] [illegible] a [illegible]

[illegible] between [illegible] and [illegible], the [illegible] [illegible]

[illegible], with [illegible] [illegible] (sic). [illegible] [illegible]

[illegible] [illegible] a [illegible] after six months' work, that [illegible]

[illegible] replied, "Hope, if you [illegible] [illegible] [illegible] after six [illegible]

[illegible] [illegible] [illegible]."

For the [illegible], R. G. Dunnle, testified that he

was [illegible] [illegible] of the [illegible] [illegible], that [illegible]

and [illegible] [illegible], the latter having charge of 77 miles

of [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] were to superintend the work, that he might employ a

single laborer, but that he had no authority to employ [illegible]

gangs or foremen; that the witness employed the gang of men

through their foreman, Jesse Lewis, at his office in Pecos;

that Lewis came to him and said that they wanted to leave the

Milwaukee Railroad on account of some dissatisfaction; that the witness refused to hire them away from the Milwaukee Railroad, but stated that if at any time they quit working for the latter company, he would employ them; that he employed the extra gang and foreman, but nothing was said by him or Aveno about transportation at that time; that four or five days afterwards the gang went to work for the defendant company. He further testified that some of the men were given transportation back when they exhibited telegrams indicating that there was illness in their family; the witness also testified that at that time, there was a rule of the defendant company, laid down by the pass bureau, that transportation might be issued after six months service to laborers, such as plaintiff and the men hired by him through James Aveno.

The deposition of Anderson was read. He testified that he was roadmaster of defendant's second division, which ran from Pasco to Toppenish. "I got this gang April 4, 1921, at Pasco, Washington"; that there were about fifteen men in the gang; that they cameform Ellensburg, having left the Milwaukee Railroad Company's employ; that James Aveno was foreman of the gang; that the men were employed under his supervision from April 4th to October 25, 1920, when they were turned over to another division of defendant's railroad. The deposition is as follows: "Q. State whether or not you or anyone in your behalf, or any other person in your presence or otherwise to your knowledge, ever made a statement to these men that you would give them free transportation to St. Paul or anywhere else, if they remained with the company six months. A. No, sir, I did not and I never heard of any such arrange-

ments. I have never heard of any promise ever being made by anyone to a gang of laborers or anyone else"; that his superior was Mr. Rupple, division roadmaster.

It was undisputed that plaintiff paid $62.12 for his transportation to St. Paul, Minnesota.

1. The defendant contends that the contract made between plaintiff and defendant is invalid, because it lacks mutuality, in that plaintiff's testimony is that "If you work six months you get a pass." But that the plaintiff did not agree to work for six months and, therefore, there was no mutual obligation. Even if we should assume that the argument made by counsel for the defendant is borne out by the record, it would be of no value here, because the evidence discloses that plaintiff did go to work for the defendant company and continued in its employ for more than six months. The offer of the defendant, through Anderson that plaintiff would be given a pass for the work of six months, when acted upon by plaintiff became an absolute obligation. Star Brewery v. Farnsworth, 172 Ill. 247.

2. It is next contended that even if Anderson had agreed to give the transportation as plaintiff's testimony tended to show, it would not be binding on the defendant, because Anderson had no such authority. The evidence shows that Anderson was a district roadmaster, having charge of more than 70 miles of track; that he was authorized to hire and discharge individual men, such as plaintiff; that the rule of the company then in force, was that men such as plaintiff might be given transportation after they had worked six

months for the defendant company; that plaintiff was advised of this fact by Anderson. In these circumstances and considering all the evidence in the record, we think the court was fully warranted in holding that the defendant was bound by what Anderson said or did in respect to the issuance of passes.

3. It is also contended that plaintiff's statement of claim is not sufficient to support the judgment, because it describes the contract as having been entered into at St. Paul, while the contract of employment shows that it was actually entered into at Pasco, Washington. No complaint was made on the trial that there was any variance in this respect, and apparently it was never brought to the trial court's attention. This is a case of the fourth class and under the facts as they appear from the record, we think the defendant is in no position in this court to raise the point for the first time.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

280 - 28938

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|---|---|
| CENTURY TRUST & SAVINGS BANK, a corp., Appellee, v. LEO JACOBSOHN, Appellant. | 236 I.A. 630<br>APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

Opinion filed December 24, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

The Century Trust & Savings Bank, a corporation, brought suit against Leo Jacobsohn and Mrs. R. Jacobsohn, as makers of a promissory note dated February 18, 1930, for $134.35, due 26 months after date and payable to Samuel Epstein. The note bore the following endorsement:

"Agreement of February 18th, 1930,
Samuel Epstein"

The statement of claim after setting up the note, alleged that the plaintiff had purchased and discounted the note prior to its maturity; that demand was made for payment upon the defendants and that the note was protested for non-payment at a cost of $2.55. During the trial plaintiff dismissedthe suit as to Mrs. R. Jacobsohn. There was a verdict and a judgment entered against Leo Jacobsohn for $140.45, being the amount claimed, and he appeals.

Samuel Epstein, the payee, was called as a witness for plaintiff and upon being interrogated by plaintiff's

counsel, he testified that he was the real plaintiff in the case. Thereupon counsel for the defendant made a motion that the plaintiff the Century Trust and Savings Bank be dismissed out of the case, which motion was overruled. Epstein then testified that he received the note from the defendants; that neither principal or any interest on it had been paid; that it had been protested for non-payment by the bank and he was required to pay $2.58 protest fees.

The evidence further tends to show that at the time the note was executed, there was a separate agreement entered into between Epstein, the payee and the two makers, and that the defendant Leo Jacobsohn at that time endorsed on the note the words "agreement of February 18, 1920." The note is not in the record, but a copy of it is set up in the statement of claim, and underneath the endorsement above quoted, appears the name, Samuel Epstein, the payee. Whether his name is signed as evidence of his entering into the agreement testified to by the parties, or whether he endorsed it and delivered the note to the plaintiff bank, does not appear. We think on the whole record, however, it appears that Epstein was still the owner of the note, and that the plaintiff bank had no interest in it. From this it follows, that the judgment entered in favor of plaintiff cannot stand. If Epstein was in fact the owner of the note, he might have been substituted as plaintiff on the trial in lieu of the bank, but this was not done. Redlowski v. Grossfeld & Roe Co., 192 Ill. App. 534.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, J. AND TAYLOR, J. CONCUR.

269 - 26947

SAM SILVER,

Appellee,

v.

LIBERTY TRUST & SAVINGS BANK, a corp.,

Appellant.

236 I.A. 630

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed December 24, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover $110.00 with interest thereon from May 1, 1920, claiming that he had on May 1st given $110.00 to the bank, $10.00 for its services and $100.00 which the defendant agreed to deliver to plaintiff's wife who was then in Poland; that the defendant had failed to make delivery or to refund the amount to him. There was a trial before a judge and a jury and a verdict in favor of the plaintiff for the amount of his claim, to reverse which the defendant appeals.

The substance of plaintiff's testimony was that on May 1, 1920, he called at the defendant's bank in Chicago and talked to Mr. Hyman, the president of the bank and told him that he wanted to send $100.00 to plaintiff's wife, who was then in Pultusk, Poland; that the President of the bank said that their Cashier, Mr. Landon, was then at Warsaw, Poland, and that if plaintiff would give the bank the $100.00, together with $10.00 for their services, the money would be delivered

Opinion filed December 24, 1924.

by the cashier to plaintiff's wife in Poland; that plaintiff agreed to this and gave the $110.00 to the bank. It further appears from the evidence that at that time plaintiff was given a receipt by the bank, which is as follows:

"Capital & Surplus
$400,000.00
The Bank with the Hundred Million Dollar
Board of Directors.
Liberty Trust & Savings Bank — Receipt
3158 W. Roosevelt Road — 11173
(Formerly 12th Street)
Foreign Department
Chicago, May-1 1930
Sent by S. Syler — Address — Chicago
Payee's Name — Sora Leja Zylberstein

"Address Pultusk
Poland

Phone
Garfield 1380 — Foreign amount $100- — Amount of order" $110-

On the back of this document was printed: "Subject to rules and regulations of European post offices. It is agreed that we are not liable for any delay caused by European Post Offices or any other cause beyond our control.

"Refunds if any will be made at the current rate of exchange.

Foreign Exchange Dept.

"Remittances made to all parts of the world, drafts issued on all principal banks of the world with which we are in direct connection.

"Payee's Return Receipts furnished in due course of time. Foreign money bought and sold."

Cable Order Dept.

"Money delivered by cable or wireless to any point

on the Globe."

Then follows other printed material which is in the nature of an advertisement.

The President of the bank, Mr. Hyman, did not testify. The Cashier, Mr. Landon, testified, that he had been Cashier of the bank since 1919; that in May, 1920, he was in Poland; that he went to Pultusk, Poland, which he said was five or six hours' ride by railroad from Warsaw; that he personally deposited plaintiff's money, which was in the form of a letter of credit, in the discount bank in Warsaw.

It further appears from the evidence that the money was never received by Silver's wife, and he made a demand for its return, which was refused. There is some evidence in the record tending to show that the Warsaw bank had sent the money through the post office from Warsaw to plaintiff's wife at Pultusk.

When Mr. Landon, the Cashier, was testifying on behalf of the defendant, its counsel endeavored to show by the witness, the meaning of the receipt which was given by the bank to plaintiff on May 1, 1920, to the effect that the custom was to cable the money to Europe. This was objected to and the objection sustained. We think the ruling was proper. The testimony showed that the money was to be sent to Warsaw where Landon, the cashier of the bank, was to deliver it to plaintiff's wife personally. What counsel for the defendant was apparently trying to show was that it was the usual custom in sending money from this country to Poland, to cable it over and then use the post offices there. This, of course, would n

apply where the defendant's own testimony shows the cashier went to Warsaw personally.

The defendant further contends that the so-called receipt above quoted, was the contract between the parties and that it was error for the court to hear evidence varying the terms of this written contract. A further contention is that under this document, which was the contract between the parties, the only duty resting upon the defendant was to use reasonable diligence in selecting agents to forward the money to plaintiff's wife. A number of cases are cited, but we think none of them are in point. The receipts given for the money in those cases were entirely different, some of them being signed by the party who forwarded the money. We think the parol evidence rule was in no way violated by the ruling of the trial judge. The document does not purport on its face to be the contract of the parties. The testimony of the plaintiff which is uncontradicted, was that the president of the bank said that the money would be given to plaintiff's wife by the defendant's cashier, who was then in Poland. Under the evidence in the record the jury's verdict, finding in favor of the plaintiff cannot be disturbed.

Defendant further contends that the judgment is erroneous, because in no event could it be liable for the full amount which plaintiff gave the bank, but was only liable for a certain number of Polish marks, or its equivalent in American money and cite cases in support of this, among them being a decision ofthis court, Weiss v. Liberty Trust & Savings Bank, 277 Ill. App. 405. In the Weiss case it was held that where a bank received money to be delivered to a person in Poland

apply where the defendant's own testimony shows the matter went to larceny personally.

The statement further contends that the no-evidence rule should apply, but the contract between the parties was that it was upon the plaintiff to keep accurate records of the sales of the original commodity. [illegible] is also under his discretion, which was the contract between the parties. The only duty resting upon the defendant was to use reasonable diligence in order using reports to forward the money to plaintiffs's wife. A number of cases are cited, but we think none of them are in point. The receipts given for the money in these cases were entirely different, some of them being signed by the party who forwarded the money. In which the court evidence rule was in no way violated by the making of the final order. The statement does not purport on its face to be the evidence of all witnesses. The testimony of the plaintiff which is uncontradicted, was that the defendant of the book and that the money [illegible] be paid to plaintiff's wife by the defendant's mother, not the time it [illegible]. There the evidence in the record the jury's verdict. Further is there of the plaintiff means be identical.

[illegible] contract [illegible] is passed in accounting, because he is also bound to be liable for the [illegible] based upon plaintiff upon the [illegible], but not only leave the a certain number of [illegible] money, at the [illegible] so handed money but this money is entirely at that, [illegible] a business office [illegible]. Cases: [illegible] 3 [illegible] 377 Ill. App. 400. In the [illegible] it was held that where a [illegible] money to be [illegible] to a person in [illegible]

subject to delays in Europe from other causes beyond the bank's control and where the bank attempted to make delivery of the money but on account of war conditions was unable to do so, and the money was returned to the forwarding bank here in depreciated foreign exchange, the bank in Chicago was liable to the customer for the value of such depreciated currency and not for the amount originally deposited. In that case plaintiff testified: "It was my understanding that this money was to be cabled." In the case at bar, the evidence discloses that the money was to be delivered by a representative of the bank to plaintiff's wife in Poland, and a representative of the bank went to that place, which was a few miles outside of Warsaw, Poland. Whether he attempted to deliver the money to plaintiff's wife in Pultusk, when he was there, does not appear. But it does appear that he was compelled to leave Poland on account of political disturbance. The evidence shows that the defendant agreed to deliver the money personally and having failed to do so, it should be required to refund the money received. There is no question of depreciated currency in the case and this too, even if it be assumed that it was the understanding between the parties that when defendant's cashier would hand the money to plaintiff's wife in Poland, he would do so in Polish money, because at that time he would have the American $100.00 or its equivalent in Warsaw, and there certainly could be little or no depreciation between that time and a reasonable time thereafter within which he should deliver the money to plaintiff's wife, which the evidence shows was but a few miles from Warsaw.

The judgment of the Municipal Court of Chicago is affirmed.

THOMSON, J. and TAYLOR, J. CONCUR. AFFIRMED.

subject to delays in Europe from other causes beyond the bank's control and where the bank attempted to make delivery of the money but on account of war conditions was unable to do so, the money was returned to the depositor, that here in transmitting foreign exchange, the bank in Europe was liable to the customer for the value of such depreciated currency and not for the amount originally deposited. In that case plaintiff testified: "It was my understanding that this money was to be mailed." In the case at bar, plaintiff testifies that the money was to be delivered by a representative of the bank to plaintiff's wife in Poland, and a representative of the bank went to that place, which was a few miles outside of Tarnow, Poland. Whether he attempted to deliver the money to plaintiff's wife in Poland, when he was there, does not appear. But it does appear that he was compelled to leave Poland on account of political disturbances. The evidence shows that the defendant agreed to deliver the money personally and having failed to do so, it should be required to refund the money received. There is no question of depreciation of currency in the case at bar, even if it be assumed that it was the understanding between the parties that when defendant's emissary would hand the money to plaintiff's wife in Poland, he would do so in Polish money, because at that time he would have the amount in $125.00 or its equivalent in German, and there certainly would be little or no depreciation between that time and a reasonable time thereafter within which he should deliver the money to plaintiff's wife, which the evidence shows was only a few miles from Tarnow.

The judgment of the Municipal Court of Chicago is affirmed.

THOMSON, P.J., and TAYLOR, J., concur. AFFIRMED.

28965

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GEORGE MATHESON, a minor by HUGH J. MATHESON, his next friend,

Appellee,

v.

ALBERT EISENBAUM, et al on appeal of BENJAMIN M. KLEIN,

Appellant.

236 I.A. 630

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed December 24,1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff by his next friend brought suit against the defendant Benjamin M. Kline and one Albert Eisenbaum to recover damages for personal injuries. There was no service of process on Eisenbaum. He did not appear and the suit was dismissed as to him. There was a trial before a judge and a jury and a verdict and judgment rendered against the defendant Klein, for $1500.00 to reverse which he appeals.

The record discloses that about six o'clock in the evening of November 3, 1919, plaintiff, a little boy between five and six years of age was struck and injured by an automobile as he was crossing Lincoln avenue, near the intersection of that street with Paulina street. The automobile was owned by the defendant Klein and plaintiff contends it was being driven by Klein at the time the plaintiff was injured, while, on the other hand, the defendant's position is that the car was being driven by Eisenbaum.

The defendant contends that there should have been

Opinion filed December 14,1934.

a directed verdict in his favor at the close of all the evidence as requested, because there was no evidence, or but a scintilla of evidence, tending to prove that Klein was driving the car at the time it struck the boy. He further contends that even if it may be held that there was sufficient evidence to warrant the submission of the case to the jury, that the verdict is manifestly against the weight of the evidence, and in either case the judgment cannot stand. The other point made by the defendant is that the judgment is excessive. These are the only two points made.

1. We have carefully considered the evidence in the record and are clearly of the opinion that the court was right in refusing to direct a verdict for the defendant, because there was evidence tending to establish the liability of the defendant Klein. We are also clearly of the opinion that the finding of the jury to the effect that the car was driven by Klein at the time in question, is not against the manifest weight of the evidence, and therefore, we are not authorized under the law, to disturb the judgment rendered in plaintiff's favor.

William Diarks for the plaintiff testified that he was a motorcycle expert and was employed in the Police Department of the West Park Board of Chicago; that at the time in question he was waiting for a street car to go downtown in Lincoln avenue, a street which runs northwesterly and southeasterly in Chicago, near its intersection with Roscoe street, an east and west street, and Pauline street a north

and south street; that there was a double line of street car tracks in Lincoln avenue, but none in the other two streets; that there was no traffic at that time in Lincoln avenue; that he heard a noise and upon looking saw two automobiles coming down Lincoln avenue, and the drivers appeared to be racing, one endeavoring to get ahead of the other; that they were going from thirty to thirty-five miles per hour; that the little boy who was injured, stepped out into the street about seventy-five feet away and when he had gone about four or five steps, was struck by one of the automobiles, knocked down and the automobile was turned suddenly to the left, running across Lincoln avenue and struck a building on that side of the street; that the other automobile which was being driven near the center of the roadway of Lincoln avenue, continued on down that street; that the witness went over to the little boy who was down in the street, and the driver of the automobile which struck the boy got out and they took the little boy, who was bleeding and seemed to be unconscious, to the office of a doctor which was located a few doors from the street intersection; that the witness placed the boy on a table in the doctor's office, and the doctor proceeded to examine him; that the boy was unconscious, blood was coming out of his mouth, nose and ears, and his teeth seemed to be knocked out; that he was all covered with dirt and his face covered with blood; that the witness stayed in the doctor's office but a few minutes; that there were other persons there as well as the driver of the automobile, none of whom he knew; that he then left and the police patrol was just coming; that he did not know the driver of the automobile. The record dis-

closes that when counsel for plaintiff asked the witness if the driver of the machine that struck the boy and who went with the boy to the doctor's office said anything on the way over to the doctor's office, an objection was made and sustained, and the witness not permitted to say. An examination of the record here discloses that counsel for plaintiff was apparently endeavoring to show by the witness that when he and the driver of the machine were taking the boy to the doctor's office, the driver told the witness his name, but defendant's counsel, objected to this and the witness was prevented from testifying, and while the question is not urged here, we think the witness should have been permitted to answer, because the question of the identity of the man was vital in the case, and we know of no better way of proving the identity of a person than by the person himself. It is certain that the evidence was competent. This witness further testified that when he left the doctor's office, the driver of the car remained. The abstract of the record shows that the witness testified that the driver of the car left the doctor's office when the witness did, but this is not borne out by the record. In the record it appears: "Q. And then you went away, Mr. Diarks? A. Yes, Sir." And on crossexamination: "Q. And at the time you left, the man that was driving the car, was still there? A. Yes, Sir." Diarks was the first witness called on the trial and during his examination in chief, counsel for plaintiff asked counsel for the defendant, if Klein was in the courtroom, to which counsel replied that he was not, and thereupon plaintiff's counsel asked when the defendant was expected to be in court, and defendant's counsel replied, in the afternoon. The wit-

ness was then interrogated as to the appearance of the driver of the car.

James Needham, called by the plaintiff testified that he lived a short distance from the place of the accident; that he had left his home and was on the easterly side of Lincoln avenue, near the point where the boy was struck; that he saw two automobiles coming down Lincoln avenue at about thirty to thirty-five miles per hour. He then described how the boy was struck, and that the automobile after striking the boy was turned sharply across Lincoln avenue; that it was just getting dark; that he did not know whether there were any lights on the automobile or not; that he did not hear any horn; that he could see the automobile about a block away; that he did not know who the little boy was, but learned afterwards; that the automobile struck the building on the easterly side of Lincoln avenue and bounced back on the sidewalk; that the driver and Mr. Diarks carried the injured boy from the place he was struck; that he saw the driver of the automobile at the time, but had not seen him since then, until a few days before the trial when he was pointed out to him by plaintiff's brother; that he then recognized him; that Klein who was pointed out to him was the same man that drove the automobile that struck the boy. Needham was about 13 years old at the time of the accident.

H. J. Matheson, father of plaintiff, testified that about 6:45 P.M. he got home from his day's work and learned of the accident; that about an hour afterwards an officer and three men came to his home; that one of the men gave him

been was then incorporated in a top processing of the driver of the car.

Among Jerrdsen, called by the plaintiff testified that he lives a short distance from the place of the accident; that he saw Joe leaf his home and run on the westerly side of Lincoln avenue, and he saw Joe going very fast; he stated that he saw the automobile driven by Joe strike a car standing on the westerly side of Lincoln avenue, and he stated that he saw Joe drive the car a short distance after the accident and then he stopped the car and ran back to the place where the car was standing. He testified that he saw the automobile after striking the car was turned sideways across Lincoln avenue; that it was just getting dark; that he did not know whether there were any lights on the automobile; that he did not make any sound that he could see the automobile where I stood; that he did not hear any sound; that the automobile stopped a short distance after he did not hear the little boy was, but learned afterwards; that the automobile struck the building on the westerly side of Lincoln avenue and turned back on to the sidewalk; that the driver did not attempt serious injury by turn the place to the street; that he saw Jim. Wright or the automobile at the time, but had not seen Mr. Kane. Wright said a car hit Joe before the trial when he was pulled out to the by Lincoln's building; that in the conversation that Klein was and pulled out to be him was the car that hurt the automobile that struck the boy. Jerrdsen was about 12 years old at the time of the accident.

I. J. Jerrdsen testified, testified that about 6:45 P.M. he was home from his boy's work and learned of the accident that about an hour afterwards an officer and there was some to him sound that one of the men gave his

a card with a printed name on it and also wrote an additional name on the card, and said that they were the parties that run down the boy and they were partners in the machine;" that he had mislaid or lost the card; that the names on the card were Klein and Eisenbaum or Eisendrath; that the three drove with him to the police station where a report was made; that one of the young men had lost four fingers of the right hand; that they drove to the Alexian Brothers Hospital where the injured boy had been taken by Klein and Eisenbaum; that he took the license number on the automobile.

Hugh W. Matheson, a brother of the plaintiffs who was about 18 years old at the time of the occurrence, testified that when he got home on the day in question and learned about the accident he went to the octor's office on Lincoln avenue looking for his brother, the plaintiff; that when he got to the doctor's office, the defendant Klein was there; that he did not know him personally, but had seen him around bowling alleys and in theneighborhood and that Klein's father had a business on Lincoln avenue about two blocks from where the witness and his family lived; that at that time the little boy was on the doctor's table, but he was so covered with dirt and blood that he did not recognize him; that he then went back home and later went out again looking for his brother, visiting different hospitals; that later on in the evening, he went in a automobile with other parties to the Alexian Brothers' Hospital where plaintiff was; that since the occurrence he had seen Klein on numerous occasions and that a few days prior to the trial, the witness took Needham to Klein's place of business, for the purpose of having him

identify Klein; that he also took the number of Klein's automobile and the license number.

Hyman Lieberman, testified for the defendant that he conducted his business of cleaner and dyer at No. 3044 Lincoln avenue, which was near the place in question; that he did not see the accident, but learned of it; that he saw the automobile after the occurrence standing on the sidewalk on the easterly side of Lincoln avenue, but that it did not strike the building at that side.

William Marx testified as to the position of the automobile after the accident and other matters which are not of much importance.

Mrs. Hein was an occurrence witness and testified on behalf of the defendant that she lived in the neighborhood and was crossing Lincoln avenue, walking from the easterly to the westerly side, when she noticed the plaintiff coming out of the candy store and across the street; that she heard a horn and noticed an automobile coming down Lincoln avenue, about ten or twelve feet from the boy, who was near the westerly side of the street; that the automobile struck the boy, and turned sharply to the left side of Lincoln avenue, but did not hit the building; that the automobile was going at an ordinary rate of speed about 22 miles per hour; that she saw no other automobile at the time. On cross-examination she testified that it was not dark, but that it was dusk, getting dark; that one could see a person standing about a block away at that time; that she did not know the defendant Klein or his family; that after the boy was struck, the driver got out

of the automobile, picked up the boy and took him to the doctor; that some women came along and asked the witness if she had seen the occurrence. She was then asked: "Q. Well, how long did you remain there? A. Well, I remained there a few minutes, and then this party, I believe his name is Klein, the one that hit the boy". On motion of defendant, this was stricken. She then testified that the driver of the car shortly after he had taken the boy to the doctor's office returned and took her name; that she did not know him until he told her who he was, and upon being asked, what name he gave, defendant's counsel objected, and the objection was sustained. The witness then testified that the driver of the car, that struck the boy, drove her home in his car. She also described the appearance of the driver, who, up to that time, had not appeared in court.

The defendant Klein testified that he owned the car in question at the time of the accident; that he was in the jobbing phonograph business, at No. 3148 Lincoln avenue, which was a short distance from where the accident occurred, and that at that number his father conducted a loan bank or pawn shop; that the witness first learned of the accident at his father's place of business by being informed of it by the defendant Albert Eisenbaum; that at that time there were present, Mr. Felman and Sid. Felman, the witnesses' father, mother and brother; that upon being informed of the accident, the witness took his hat and coat and went out to the machine which was in front of the store, and there was an officer, the little boy that met with the accident, and another small

—

boy in the machine, the latter being Roy Blanche; that Eisenbaum drove the car to the Alexian Bros. Hospital; that Sidney Felman, Roy Blanche and the officer went with them; that the boy was given attention there, and then they drove back to plaintiff's parent's home on Paulina street, where they saw the plaintiff's father and other members of the family and explained the accident to them; that they then drove with the father and brother to the police station to make a report of the accident; that after making this report, they all drove back to the hospital; that he knew Eisenbaum and tried to locate him the night before he was testifying; that a year prior to the trial he tried to find him and was told he was in Texas.

On cross examination he testified that he did not go to the doctor's office on Lincoln avenue where the boy was taken immediately after the accident. He then gave a physical description of the appearance of Eisenbaum and testified that this was his first appearance in court; that he did not know the case was coming up for trial until "yesterday".

Sidney Felman, testified for the defendant that he ran a cigar store near the business place of Klein's father; that he knew Eisenbaum; that he did not know plaintiff or his father at that time; that he was in Klein's father's store when Eisenbaum came in and reported the accident; that he then went in the automobile, which was in front of the store, with Klein, Eisenbaum, the officer, a small boy and the injured boy to the hospital.

The police officer, Jacob Richter, testified for

the defendant that he had been a police officer 38 years; that he was called to the doctor's office on November 3, 1919, shortly after the accident; that when he got there, the boy was in an automobile in front of the doctor's office, and that Eisenbaum was in the machine; that he went upstairs to the doctor's office and the doctor said that the boy had better be taken to a hospital; that he then went down with the chauffeur and the little boy and drove to Klein's pawnshop where they picked up a man there and drove to the hospital; that afterwards they drove back to the scene of the accident and took Klein and Eisenbaum to the police station; that he did not know Eisenbaum or Klein by name; that his memory was not clear on the whole affair.

Roy Blanche, who was about thirteen years old at the time of the accident, testified that he lived in the neighborhood where the accident occurred; that he did not see the accident, but heard of it and went there, where he saw the little boy bleeding and that he picked the boy up put the boy in the automobile and was driven to the doctor's office on Lincoln avenue, where they stayed about ten minutes, and then went downstairs where he met a policeman and picked up two other men, Klein and Feltman, and all got in the car and went to the hospital; that the man who drove the automobile from the doctor's office to Klein's store was not Klein.

This is substantially all the evidence, except that of the doctor's, on the extent of plaintiff's injury.

We have set the evidence out in considerable detail because the defendant strenuously contends that there should have been a directed verdict at the close of all the evidence,

the defendant that he had been a police officer 30 years; that he was called to the doctor's office on November 9, 1939, shortly after the accident; that when he got there, the boy was in an automobile in front of the doctor's office, and that Clemmons was in the building; that he went upstairs to the doctor's office and the doctor said that the boy had better be taken to a hospital; that he then went down with the chauffeur and the little boy and drove to Klein's pharmacy where they picked up a man [illegible] and drove to the hospital; that afterwards they drove back to the scene of the accident and that Klein and [illegible] to his police station; that he did not know Clemmons or Klein by name; that his memory was not clear on the whole affair.

Roy Klamler, who was about thirteen years old at the time of the accident, testified that he lived in the neighborhood where the accident occurred; that he did not see the accident, but heard of it and went there, where he saw the little boy bleeding and that he picked the boy up put the boy in the automobile and was driven to the doctor's office on Lincoln avenue, where they stayed about ten minutes, and then went downstairs where he met a policeman and picked up two other men, Klein and [illegible], and all got in the car and went to the hospital; that the car was [illegible] to Klein's store was not clear.

This is substantially all the evidence, except that of the doctor's, as to the extent of plaintiff's injury.

We have set out the evidence and in considerable detail because the defendant strenuously contends that there should have been a directed verdict at the close of all the evidence

or that in any event, the verdict of the jury finding the defendant guilty, is against the manifest weight of the evidence. The jury were specifically instructed, that if they believed from theevidence, that Benjamin Klein was not the driver of the automobile in question, then their verdict should be for the defendant. So that the issue was squarely presented. We think it is not at all to be wondered at, in view of the evidence and in view of the manner in which the case was tried, that the jury found as they did. The defendant did not appear in court until all of the witnesses of the plaintiff had testified and several had been called in his own behalf, so that there were several witnesses who could not testify concerning his identity. The explanation given by the defendant that he did not know the case was set for trial until the day before, is worthy of little or no credence. The case went to trial on the 20th and was not concluded until the 23rd. Moreover, when plaintiff's witness Diarks and the defendant's witness Hein were asked concerning what the driver of the automobile said his name was, objection was interposed by the defendant. It is perfectly clear from the record that the driver told Mrs. Hein that his name was Klein and the evidence should have been admitted, but more than this, there is sufficient evidence in the record to warrant the jury in finding that Klein was the driver of the car, at least we would not be warranted in holding that their finding is against the manifest weight of the evidence. They saw the witnesses on the stand and heard them testify, as did the trial judge. There was evidence tending to show that Klein immediately after the

of this is not clear. The wording of the jury instruction on alternate guilty is confusing the western writers of the majority. The jury was specifically instructed, that if they believe from therefrom, the defendant acted in the midst of the commission of another, then their verdict should be for the defendant. In this the instruction equally prejudiced. It does not in any way to be known of it. In view of the evidence and in view of the manner in which the case was tried, that the jury found as they did. The defendant did not appear in court until all of the witnesses of the prosecution had testified and certain had been called in his own behalf, so the jurors were deprived of the witnesses who [illegible] the trial. [illegible] The evidentiary rules of the prosecution claim to [illegible] that the trial court, the jury [illegible], is entirely at liberty to be guilty. The main area is that on the 27th and the 28th of [illegible] the [illegible]. Moreover, when [illegible] witness [illegible] and the defendant's attorney [illegible] when the duties of the [illegible] said the same [illegible]. objection was [illegible] by the defendant. It is [illegible] from the reason that the [illegible] [illegible]. Then that the same [illegible] the [illegible] [illegible] been admitted, [illegible] [illegible]. There is sufficient evidence in the record to warrant the jury in finding that [illegible] was the driver of the car, at least we would not be warranted in holding that their finding is against the preponderant weight of the evidence. They saw the witnesses on the stand and heard their credibility, as did the trial judge. Their [illegible] demanding to show that [illegible] immediately after the

accident assisted in taking the injured boy to the doctor's office; that he owned the automobile; and other evidence which need not be commended upon. It is sufficient to say that there is ample evidence to warrant the finding of the jury.

2. The defendant further contends that the damages are excessive. We have carefully considered all the evidence on this phase of the case and are likewise clearly of the opinion that the damages are not excessive. The evidence shows that the boy was struck by the automobile, thrown violently to the ground and injured and rendered unconscious; that he was bleeding from the ears, mouth and nose; that there was considerable blood on his person; that he was taken to the hospital; that several of his teeth were knocked out and the jaw bone injured and other evidence tending to show that the injury is more or less of a permanent character. We think that the amount, in view of the evidence cannot be considered excessive.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

317 - 28975

GUARANTY IRON & STEEL COMPANY,
a corporation,

Appellee,

v.

THOMAS F. H. LEYDEN, ET AL

Appellants.

236 I.A. 631

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed December 24, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

We have this day handed down an opinion in the case of the Guaranty Iron & Steel Company, a corporation, appellee, v. Thomas F. H. Leyden, et al, appellants, No. 28975. In that case J. A. Taggart was made a party defendant and he filed his answer in the nature of a cross petition, seeking a lien on the same premises for the amount due him for services rendered as architect in the construction of the hotel.

The record discloses that on February 10, 1919, Taggart entered into a contract with Blackwood, then holder of the legal title to the property upon which the hotel was to be constructed, whereby Taggart was to perform the services of an architect and for which he was to be paid 5 percent of the total cost of the building; that the contract contained the following provision "The total cost is to be interpreted as the cost of the materials and labor necessary to complete the work as such cost would be, if materials were new, and all labor fully paid at current market prices when the work is ordered." Afterwards when the Blackwood Hotel Company

Opinion filed December 24, 1934.

was incorporated and the property transferred to it, as stated in the opinion filed in the other case, Taggart on the 5th of June, 1919, entered into a contract with the Hotel Company, whereby he was to render services as architect in the completion of the building and for which he was to be paid a sum of 5 percent of the total of the work. Taggart claimed in addition to 5 percent of the cost of the building $500.00 for checking over sub-contractors' accounts and bills and which sum Farley on behalf of the hotel company agreed to pay.

The master found that the total cost of the building computed in accordance with the provision of the first contract made by Taggart was $273,346.00; that Taggart was entitled to 5 percent of this or $13,667.30; that he had been paid $12,471.62, leaving a balance due him of $1195.68. The master further found that the claim of Taggart of $500.00 was not lienable. Objections were filed by Taggart to the report. They were overruled and were ordered to stand as exceptions before the Chancellor. The Chancellor found the total cost of the building to be $280,807.04 and that Taggart was entitled to 5 percent of that sum or $1734.35. His claim for $500.00 as extras in checking over the sub-contractors' accounts, was disallowed and Taggart has assigned cross errors on the disallowance of this item.

The hotel company contends that the total cost of the building upon which Taggart's commission should be computed is $273,346.00. It is admitted that the entire cost of the hotel is $280,807.04, and that the difference between the two sums is the amount of extra compensation claimed by

two sub-contractors. And it is argued that, although the extra compensation claimed by the sub-contractor be allowed, yet no recovery can be had by Taggart on this sum, because of the provision in the first contract made by Taggart. The contract after specifying that Taggart was to receive as compensation 5 per cent of the cost of the building, provided that this was to be interpreted as the cost of thelabor and material necessary to complete the work, if such labor and material were paid for at "current market prices when the work is ordered." This latter provision does not appear in the contract made by Taggart with the hotel company and under which he is seeking compensation here. It does not appear that the extra compensation claimed by the sub-contractor was not based upon the current market prices when the work was ordered. We think upon a careful consideration of Taggart's contract, he was entitled to compensation on the entire cost of the building as the decree provided.

The hotel company further contends that Taggart failed to perform his contract in that he was guilty of a breach thereof, which constituted a fraud in accepting the balconies which were of a thinner material than that called for in the contract. We have referred to this matter in connection with the other opinion this day filed. The evidence shows that the balconies were not made of as thick material as the contract required and that Taggart had rejected it; that he afterwards took the question up with Farley, as the representative of the hotel company, and it was agreed that the balconies were the best obtainable at that time and that they should be accepted. In these circumstances, we think it appears that Taggart was in no way to blame.

[illegible] commissioners. And it is argued that, although the extra remuneration claimed by the sub-contractors to allowed, was in reality not to be met by Haggerty on this sum, because of the provision in the first contract made by Tuckett.

The contract offers considerably less flexibility than is implied in representations made to the court by the plaintiff. Provision was made for a "variation" in the price of labour and material where the work is increased or decreased or the mode of execution of the work is modified. If such labour and material were held for or "reserved unused prices when the work is reduced." This latter provision does not appear in the contract made by Haggerty with the hotel company and under which he did perform considerable work. It does not appear that the extra compensation claimed by the sub-contractor was not based upon the actual market prices when the work was received. In fact, with a lateral consideration of Haggerty's contract, it was admitted to cross-examination the claim was not initiated at the market prices.

The trial judge further remarks that Lamont failed to perform his contract in that by gun quality of a bench thereof, which constituted a fraud in accepting the [illegible] which were of a higher quality than that called for in the contract. He have referred to this matter in the [illegible] with the money opinion this day filed. The evidence shows that the [illegible] was not such as to exist material as the contract required and that Haggerty had referred [illegible] that he acknowledged the condition by with Tuckett, as the [illegible] of the hotel company, and it was agreed that the [illegible] were the best obtainable at that time and that they should be accepted. In these circumstances, we think it appears that Haggerty was in no way to blame.

We are further of the opinion that the master in chancery properly refused to allow Taggart a lien for the $500.00 for the services he rendered in checking over the sub-contractors' accounts and bills. These were rendered after the building had been completed and were clerical in their nature, and were not strictly the services of an architect for which alone the statute gives him a lien.

The decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

WILLIAM J. KALISH, et al
Appellants

vs.

ANNA SCHULTZ,
Appellees.



Appeal from
Circuit Court
Cook County.

Opinion filed December 24, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

On February 3, 1923, William J. Kalish filed his bill to foreclose a trust deed in the nature of a mortgage given by Anna Schultz to secure her note for $2,000.00, due two years after date. Howard H. Hanks, the trustee named in the trust deed was also named a party defendant. The bill alleged that the trust deed, principal note and four coupon notes were executed by Anna Schultz on the 13th of July, 1920, and that to secure the payment of the $2,000.00 in interest, Anna Schultz conveyed a certain lot in Chicago to Hanks as trustee.

Anna Schultz filed her answer to the bill wherein she denied that she was indebted to Kalish in the sum of $2,000.00 or to any other person. The answer then set up that she had executed the principal and interest notes and trust deed under coercion of the officers of the Crawford State Savings Bank; that for sometime prior to the execution of the trust deed and notes, her son who was then nineteen years of age, was employed as a teller by the bank at a salary of $65.00 per month; that on July 13, 1920, the cashier of the bank came to her home and inquired for her son, stating that the bank had missed a $1300.00 deposit; that she advised him that she did not know anything about the matter and that the son was not home; thereupon the cashier left, but on the evening of the same day the cashier called her up on the telephone and asked her to come to the bank at eight o'clock that evening to attend a meeting of the

officials of the bank; that she did as requested and was there advised by the bank officials that the defendant son had taken from $1500.00 to $1600.00 of the bank's money and asked her what she was going to do about it; that she said she did not know, and then went home. The answer further sets up that on the following Monday, July 18th, about nine o'clock she was again called up on the telephone by the bank, requesting her to come at once; that she again went to the bank and was there informed by the president and cashier of the bank that her son's account was short more than $2,000.00, and stated to her that unless she settled the shortage, they would put her son in the penitentiary; that she thereupon informed the officials of the bank that she had no ready money, but had two mortgage bonds aggregating $700.00 and some personal property, and the officials advised her that if she would turn over her personal property and give a mortgage upon her real estate for $2,000.00, they would not put her son in jail; that she gave the $700.00 mortgage bonds, an Elgin motor car valued at $1800.00 and some jewelry worth $75.00; and then went with an official of the bank to her safety deposit box to obtain papers to prepare a mortgage; that Tuesday evening July 13th about eight o'clock, she again went to the bank and the officials again informed her that unless she executed the mortgage, the would have the son arrested and sent to jail. She further testified that she thereupon executed the mortgage and notes ; that she was then informed that the son's shortage was over $2,000.00. On June 24th, 1922 she filed her crossbill, setting up substantially the same facts as those in her answer and praying that the trust deed and notes be delivered up and cancelled; that the automobile, jewelry and $700.00 mortgage bonds be returned to her. The president and cashier, as individuals and as officers of the bank, the bank and Kalish were made defendants to the crossbill.

After the issues were made up the matter was referred to a master in chancery to take proofs and make up his report

which he accordingly did. He found that the sole and only reason prompting Anna Schultz to turn over the $700.00 mortgage bonds and the mortgage on her property for $3,000.00 was her belief and understanding, that by so doing, her son would not be prosecuted for embezzlement, and therefore, the consideration for the mortgage bonds and $3,000.00 mortgage was illegal and that Anna Schultz had established these facts beyond a reasonable doubt, He further found that in regard to the automobile and jewelry, that they belonged to the son and the master recommended that they be retained by the bank, but that the $700.00 mortgage bonds be delivered up to Anna Schultz and the trust deed and notes cancelled.

Objections to the report were filed by the cross defendants and substantially all of them were overruled. They were ordered to stand as exceptions before the chancellor, where they were again overruled. The master's report was confirmed and a decree entered awarding Anna Schultz, the defendant, and cross complainant the relief recomsended by the matter. The cross bill defendants being dissatisfied, prosecute this appeal.

The evidence discloses that Anna Schultz delivered the $700.00 mortgage bonds and the $2,000.00 mortgage on her property substantially as alleged by her in her answer to the bill of complaint and which we have above set forth. Upon careful consideration of all the evidence in the record, we are clearly of the opinion that the execution and delivery of all the notes and the trust deed was brought about by duress, i. e. under the belief that her son would be sent to prison, if she did not do so. In these circumstances, a court of equity will grant relief even through no promises of immunity was made by any of the defendants to the crossbill. Kronmeyer v. Buck, 258 Ill. 586.

Complaint is also made that the decree is erroneous

in compelling Howard H. Hanks and Albert Sedlacek to return to Anna Schultz the cross complainant the $700.00 mortgage bonds when the evidence discloses that they acted only as agents of the bank, and further in granting relief against the complainant and cross defendant, Kalish, in requiring the bank, Hanks and Sedlacek to return the $700.00 mortgage bonds when the evidence discloses that prior to the institution of the suit, the bank had disposed of them and they were held and owned by Kalish, the complainant and cross defendant, and further when the evidence shows that the note for the $200.00 had been paid to Kalish. The provision of the decree in question is as follows:

> "It is further ordered, adjudged, and decreed, that the defendant and cross complainant, Anna Schultz, is entitled within ten (10) days from date hereof, to the return of the $200.00 and $500.00 mortgage bonds, and that the cross defendant, Crawford State Savings Bank, Howard H. Hanks, and Albert Sedlacek, or any one of them, shall each of them be required to return, deliver and set over unto the cross complainant and defendant, said mortgage bonds within the ten day period as aforesaid."

While that part of the decree might not be considered strictly in accordance with the evidence in the record, yet we think it should be construed liberally in view of all the cirstances. Of course, the $200.00 bond having been collected, plaintiff will be entitled only to the money. The bank having obtained these two mortgage bonds aggregating $700.00, upon an illegal consideration, and they having disposed of them, it is no hardship to require them to restore the bonds or the face value of them to Anna Schultz.

Upon a careful consideration of the entire record before us, we are of the opinion that the decree of the Superior Court of Cook County must be affirmed.

AFFIRMED.

TAYLOR, J. AND THOMSON, J. CONCUR.

338 - 28996

SAM SPELLENS, ET AL,
Appellees,

v.

W. J. VANEK, ET AL,
Appellants.

236 I.A. 631

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed December 24, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought suit against W. J. Vanek, Stanley Kubasiewicz and Vanek Stanley Co., a corporation, to recover $500.00, claimed to have been made as a deposit by plaintiffs to the defendants under the terms of a lease to secure the payments of certain rents. There was a verdict and judgment in plaintiff's favor for the amount of their claim against the two individual defendants, the suit having been dismissed as to the defendant corporation on motion of the plaintiffs.

There is considerable confusion and uncertainty in the record, but from a careful consideration of all the record, we think it appears that on the 24th of January, 1922, plaintiffs rented from the defendants certain premises located at No. 4548 South Ashland avenue to be occupied by plaintiffs as a hardware and paint store. A written lease of that date was executed. In that lease the landlord is mentioned as Vanek- Stanley & Co., a corporation, and plaintiffs as tenants.

Opinion filed December 24, 1924.

The lease, however, is signed by the two plaintiffs and the two individual defendants. By the terms of it, the premises were demised from the 1st day of February, 1922 until the 30th day of April, 1926, at a rental of $6,000.00, $400.00 upon the execution of the lease, $100.00 upon the first day of February, 1922, and on the first of each month thereafter, to and including the month of December, 1922, and after that date at $125.00 per month, payable upon the first day of each month and every month to and including December, 1925. After the execution of the lease, plaintiffs took possession and conducted the store therein until about the 18th of August, 1922, when there was a fire, which the evidence of plaintiffs tended to show so damaged the premises as to render them untenantable, and after plaintiffs had negotiated with the defendants for sometime in an endeavor to have the latter repair the damages done to the premises so that plaintiffs might continue their business and the defendants had failed to make any repairs, plaintiffs vacated the premises and brought this suit to recover the $500.00.

Both plaintiffs testified and their evidence tends to show that at the time the lease was executed, January 24 , 1922, they paid the two individual defendants $500.00 and at that time obtained two receipts. The receipts are in the record, each dated January 24, 1922. One acknowledged receipt from plaintiffs of $400.00 "being the amount due this date on lease bearing even date herewith, executed by said Spellens & Golden and Stanley Vanek Co. $400.00." The other receipt states that the $100.00 is "payment of rent for the month of December, 1922"

under lease bearing even date herewith executed by the said Spellens & Golden and Stanley-Vanek & Co., $100.00". Each of these receipts in the record appears to be signed by Stanley Vanek and Stanley Kubasiewz. These receipts are not abstracted, but defendants have supplied this omission in their brief and the receipts as there supplied appear to be signed "Stanley Vanek & Co., Hanley Kubasiewcz." Defendants in their reply brief say that since the filing of the record and the abstracts and briefs in this court, the two receipts have been altered as will appear upon the reading of their brief. This is a novel way of showing that the record has been tampered with. We must, however, rely upon the record as filed, unless something more appears than taking what counsel claims to be the receipts as shown in their briefs. Plaintiffs evidence further tends to show that on August 18, 1922, a fire occurred, so damaging the premises as to render it untenantable that they took the matter up with the defendants, with a view to having the latter repair the building, and that at first the defendants said they would do so, but later on refused to make any repairs, but told plaintiffs they could vacate the premises and that the defendants would pay back to plaintiffs the $500.00; that they acted upon this, vacated the premises, demanded the money, but the demand was refused.

Stanley Kubasiewcz was the sole witness for the defendants. He gave testimony to the effect that the damages done to the premises by the fire were but slight, and that afterwards the owner of the premises repaired the damages. He denied that defendants told plaintiffs they could vacate

the premises and they would be given back their money. During the course of the trial counsel for the defendant was apparently endeavoring to prolong the case more than one hour, so as to have the case stricken from the short cause calendar, and made numerous objections to this effect, all of which were overruled, and a great part of his cross examination of the plaintiffs had no bearing upon the issue, and other parts of the examination were apparently of a trivial character. If, as the defendants contend, the owners of the property actually repaired the building after the fire and the damage was but slight, this ought to have been a simple matter to show, but no effort appears to have been made to bring the owner of the property or other witnesses into court. Under the evidence in the record, we are clearly of the opinion that the verdict of the jury, finding in plaintiffs' favor, was the only one that could have reasonably been expected. The defendants contend that the court improperly admitted in evidence over their objection, photographs taken of the premises after the fire without a proper foundation having been laid. The evidence, shows, however, that the witnesses who testified, saw the photographer take the pictures and on the trial they testified that the pictures were a correct representation of the condition after the fire. A further contention is made that the lease in question was made by the corporation and not by the individual defendants. The lease shows on its face that it was signed by the individual and, therefore, was not the corporation's lease

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

350-28008
39008

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| ROSE MARRONE, Appellee<br>vs.<br>FRED ALLEN AUTOMOBILE SUPPLY CO., a corporation. Appellant | Appeal from<br>Superior Court<br>Cook County. |

236 I.A. 631

Opinion filed December 24, 1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover damages for personal injuries claimed to have been sustained by her by being struck by an automobile which was driven by one of defendant's servants. There was a verdict and a judgmentment in plaintiff's favor for $2500.00 and the defendant appeals.

The record discloses that shortly after noon on December 8, 1921, plaintiff and another woman were walking east on the north sidewalk of Adams Street, an east and west street, in Chicago, and as they were crossing Franklin Street, a north and south street, she was struck by an automobile belonging to the defendant which was being driven south in Franklin Street.

The defendant contends that the evidence discloses that plaintiff was not in the exercise of due care and caution for her own safety and that it further discloses that the defendant was guilty of no negligence. The evidence tends to show that at the time in question the weather was clear and the streets and sidewalks dry; that plaintiff and another woman, who were employed on Adams Street, a short distance west of Franklin Street, left their place of employment at the noon hour and proceeded to walk east on the north sidewalk of Adams Street; that as they came to Franklin Street, the north and south traffic in that street was stopped so as to permit the

manifest weight of the evidence. In these circumstances we are not warranted under the law in disturbing the judgment. The defendant's argument seems to be that when the policeman gave the signal for the north and south traffic to proceed, the driver of the automobile was authorized to drive his car south at once. Of course, this argument is unsound. When the signal was given, the women were almost, if not immediately, in front of the automobile. They were about 15 feet from the west curb of Franklin Street, and while the signal was notice to the driver to proceed s outh, yet he could not do so without regard to the rights of the people who were rightfully in the street. The most that can be said is that the record discloses a state of facts that warranted the submission of the questions to the jury. No complaint is made that the jury were not properly instructed, and therefore, it follows that the judgment ought not be disturbed, since we are unable to see that their finding is against the manifest weight of the evidence.

5. The defendant further contends that the damages awarded are excessive, and in support of this cites three cases, the latest decision of three being rendered by this court, in the cases of The Fair v. Himmel 80 Ill. App. 215, which was about thirty years ago. We have repeatedly held in many recent cases that on the question of the amount of the damages, the earlier decisions of this state are of little assistance, because of the fact that the money value of life and health has been appreciating and the purchasing power of money depreciating during recent years. Posch v. Chicago Railways Co., 221 Ill. App. 441. The evidence discloses that the automobile struck plaintiff, thrown her to the pavement; that she was picked up and taken to a nearby hospital, where a physician and surgeon was called and made an examination. He found her right knee swollen and the scalp on the right side of her head was torn; that her left side was bruised; that her ankle was swollen and she was semi-conscious

and hysterical; that on the next morning the physician made a more thorough examination and found that the sixth and seventh ribs on her right side were fractured; that the right hip and knee were injured; that she was in the hospital nine or ten days and then went home where she was obliged to stay about six weeks before being able to return to her employment. The doctor further testified that the exterior lateral ligament was torn and when the knee was moved the bone nips the ligament and pain results. The trial took place about a year and a half after the injury and the doctor testified that he had examined her about four or five months before the trial, that plaintiff complained that if she took a deep breath, it caused her pain, which he attributed to traumatic pleurisy; that the end of the rib which was fractured pushed a hole through the pluera; that he then examined plaintiff's knee and found "crepita was still there, indicating that it has not healed, and that it is permanent, which will have a tendency to weaken the leg and effect her ability to walk and work"; that he considered her injuries were permanent.

From a consideration of all the evidence on this phase of the case, we are of the opinion, that we would not be warranted in disturbing the judgment on the ground that the damages awarded were excessive.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, J. AND THOMSON, J. CONCUR.

29291

202 - 23391

IDA R. MILLER and
ELIZABETH KOHN,
Appellees,

v.

DONALD I. GRAHAM,
Appellant.

236 I.A. 632

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed December 24,1924.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought an action of forcible detainer against the defendant to recover possession of an apartment in a building owned by plaintiffs and occupied by the defendant as a tenant. There was an instructed verdict for the plaintiffs at the close of the case. Judgment was entered on the verdict and the defendant appeals.

The record discloses that defendant had occupied the apartment in question for a number of years as a tenant. Whether he was under a written or oral lease or when it began and terminated, does not definitely appear, but it seems to be conceded by both parties that defendant's leasing of the apartment expired on May 1, 1923. Sometime during the month of May, 1923, plaintiffs purchased the premises apparently from the formerlandlord and on June 2, as plaintiffs contend, or June 18, 1923, as defendant testified, a written document, being the ordinary lease used in such cases, was executed by the parties. This document or lease is dated June 2, 1923, and by its terms plaintiffs purport to demise to the defend-

ant the apartment in question from the first day of May, 1923, until the 30th day of September, 1923, at $75.00 per month, payable monthly in advance. It contained a provision to the effect that the lease would terminate September 30, 1923, provided sixty days written notice were given by either party of such intention, but if such notice were not given by either party, the lease should continue from year to year until terminated by a like notice in some ensuing year; that plaintiffs might terminate the lease by giving such notice, "by mailing said notice to the within premises addressed to said lessee."

The evidence discloses that on July 24, 1923, plaintiffs sent a letter by registered mail, addressed to the defendant at his residence in the apartment building, notifying him, pursuant to the terms of the lease under which he was occupying the apartment, of their intention to terminate the lease on September 30, 1923. The evidence further shows that defendant was out of the city at the time the letter was sent, and that it was delivered to his office in the downtown district. A young lady who was employed by other persons in the same suitewas that occupied by the defendant, receipted for the letter, although she testified she had no authority to do so; that she delivered it to the defendant on August 4th, when he returned. The defendant gave testimony to the effect that at the time the lease or document was executed by the parties, it was expressly understood and agreed that it should not become a binding lease or contract unless plaintiffs sold the premises within the term of the lease. Upon objection the trial court

held this evidence inadmissible as tending to vary the terms of the written document and obnoxious to the parol evidence rule. The defendant also offered in evidence a letter, dated October 1st, written by him to plaintiff Miller, in which it was stated that he enclosed his check for $75.00, in payment of the October rent for the apartment; that he enclosed the check and mailed it to the plaintiff and that he had not received the check back.

The defendant in his opening brief contends that the judgment should be reversed, because the evidence discloses that he had paid the rent for the month of October, and therefore, the suit would not lie since it was instituted on October 2, 1933. This is the sole point made in the opening brief and under rule 19 of this court, we might disregard any other points made by the defendant, were it not for the fact that the judgment must be reversed because defendant had shown prima facie, that he had paid the October rent and therefore, the plaintiffs could not recover.

We think the evidence offered on behalf of the defendant to the effect that the lease was delivered to plaintiff conditionally,- that it was not to become a binding contract unless plaintiffs sold the premises, was admissible. Northwestern Consolidated Milling Co. v. Sloan, Appellate Court, First District, No. 28083; Jordan v. Davis, et al, 108 Ill. 336; Kilgoin v. Ortell, 302 Ill. 531; Bell v. McDonald, 308 Ill. 339. This evidence did not violate the parole evidence rule, but tended to show that the delivery of the lease to plaintiff was upon a condition and that it was not to become

operative until the condition had been complied with.

For errors indicated, the judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, J. AND TAYLOR, J. CONCUR.

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| ANTONIO DeSTEFANO, Appellee, vs. ASSOCIATED FRUIT COMPANY, a Corporation, Appellant, | APPEAL FROM SUPERIOR COURT COOK COUNTY. |

Opinion filed December 24, 1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On the morning of October 18, 1920, the plaintiff, Antonio DeStefano, bought from the defendant, the Associated Fruit Company, a car of grapes which were en route between Petaluma, California and Chicago, and paid therefor $2,155.15, and received at that time from the defendant a sales memorandum which recited the date of the sale as October 18, 1920; the date of shipment from the shipping point in California as October 8, 1920; the quantity of grapes; that they were f.o.b. shipping point, and the price. It, also, contained the words: "Terms: Cash. Acceptance in Transit." It was stamped as paid October 18, 1920.

The car of grapes arrived in the yards of the Santa Fe Railroad in Chicago on October 28, 1920. On examination they were found to be in very bad condition. On the next day the plaintiff notified the defendant in writing that, owing to the condition of the grapes and as they were ordered on the representation that they would arrive in Chicago on October 19, but did not arrive until October 25, he rescinded the purchase and would dispose of the grapes for the benefit of the defendant at the best price he could obtain in the market, and pay the defendant for what he received and charge it with the difference, the amount he received and the price he paid for the grapes, together with freight charges and

all expense of handling. On October 30, 1920, the defendant wrote to the plaintiff stating that it did not represent the car other than as represented in the plaintiff's invoice; that it did not state at "what time or date this car would arrive Chicago, as when we sell grapes f.o.b. for cash we do not guarantee the time of arrival or the condition in which same will be when they arrive destination." The plaintiff sold the carload of grapes for $769.72. On January 14, 1921, he brought suit against the defendant for the difference between what he had paid out and what he had received, and obtained a verdict and judgment against the defendant in the sum of $1800.00. This appeal is therefrom.

It is important to determine what the contract that was made actually was. The plaintiff undertook to show by evidence that the defendant had made material misrepresentations of fact as to the date of shipment, the time of arrival and the quality of the grapes, and that he, the plaintiff, relied upon them, and that as the grapes were bad when they finally arrived and that at the first opportunity to inspect them, he rightfully rescinded the sale. The defendant claimed that they were bought en route, "as is," and that no such misrepresentations were made that were material and that there could be no rescission.

The plaintiff, DeStefano, testified that he had been in the grape business for five years, and on October 18, 1920, had a conversation with Courley, from whom he had bought a

number of cars of grapes before; that he called at the office about nine or ten o'clock in the morning, and asked him if he had any cars of grapes to sell; that Gourley told him he had; that Gourley had a lot of notices on the table; that the witness said, "All right, pick out two or three cars," that he would take one; that Gourley then did so; that the witness said, "Do you think it will be dry packing?" that the defendant said, "Yes, I have a nice shipment down there; they send a lot of good stuff here that is all right, that is, a shipment of grapes from California dry packing;" that the witness said, "All right;" that he further said that he would take three cars; that he got the arrival of the cars; one car shipped out on the 8th, one on the 9th, and one on the 10th of October from California; that the two cars shipped on the 9th and 10th arrived before the car that was shipped on the 8th.

That the next day he asked Gourley if the car had come, and he said, "Yes, it will be here any minute;" that in the afternoon Gourley told him the same thing; that when he went to the office originally, Gourley told him the car was shipped on the 8th; that it would arrive the next morning; that he asked Gourley if the car was dry packing and in good condition, and Gourley answered, "Yes, I got a good shipment down there. The car will be in good condition." "All right, you will have a good car of grapes." I have a lot of cars before and have no blame on him. He is a good car. I have nothing to say before." When the court asked the witness, "Did you tell him that you would take his word?" the witness answered, "I believe what you say, because if the car is dry

packing, I take the car." He further testified that he paid $2,155.15 that day; that he saved the memorandum, and that it was stamped "paid," but that he did not get a bill of lading for the car; that on the 19th he talked with the man who was working there for the association, and asked him about the car, and that that man said, "It is in any minute in the yard;" that twice that day the man said the same thing; that on the 20th he talked with the same man that took care of the cars; that he asked him if the car was in; that the man then said, "- - - the car must be yesterday over there. What is the matter up here;" that he went there again on the 20th; that the man said, "Well, the car was shipped on the 12th;" that the witness said, "What's the matter, you said the car was shipped on the 8th, and now the car is shipped on the 12th;"that he went there on the 21st, 22nd, 23rd and 25th, and talked with the same man that took care of the cars; that on each day he said the car was in the yard; that he then went to the Santa Fe Yards the morning of the 26th, and when the car was opened "it stink and was dry and rotten, worms, the whole of the car was not good"; that he then went back on the 26th and talked to Gourley, and told him to send somebody to see how the grapes looked; that he did not want the car, and after he had been out to see the car again, he went to Gourley, and the latter said, "Nothing doing; ain't no use coming here. Now it is your car;" that he then went to his lawyer, who prepared a notice which he took the next day and delivered at the office of the defendant, rescinding the purchase; that that day, October 29, he paid $657.09 for freight; that he subsequently sold the grapes for $768.72.

On cross examination, he testified that he knew the cars that he was talking to Gourley about on the first day had already been shipped; that he did not know whether Gourley had ever seen the grapes or not, or whether the defendant had raised grapes themselves or not; that he knew that the defendant bought grapes after they were shipped; and that he did not know that the car he bought was somewhere between California and Chicago at the time he bought it; that it does not take more than nine days for a car to come from California to Chicago; that he, himself, did not know where the car was; that he took Gourley's word; that he did not know whether the car had been shipped or not; that he knew that it was simply Gourley's estimate as to when the car would arrive; that he had received invoices for grapes from the defendant en route on terms other than acceptance in transit; that that was two or three years ago; that when a car is shipped dry packing it arrives in Chicago in good condition, if it takes from 15 to 22 days; that the man who takes care of the cars said the cars would be in good condition when they arrived, and told him the car had been shipped on October 8; that he always bought cars that were en route; that the invoice with the terms of sale always contained the words, "Acceptance in transit;" that he bought them while in transit; that they would give the invoice showing when the car was shipped; that he asked when the car was shipped; that he knows the meaning of the words, "Acceptance in transit;" that it means acceptance when en route; that there were 910 lugs, or boxes, in the shipment.

The witness, Maggio, in the business of buying and selling grapes, testified that he was at the offices of the defendant on October 18; that he saw Gourley and the manager, and the plaintiff

there, and heard a conversation between Gourley and the plaintiff; that the plaintiff said to Gourley, "I want a car of grapes, got to be close to Chicago;" that Gourley said, "Yes, we got one car going to be on the track tomorrow;" that the plaintiff said, "All right, I take that;" that Gourley wanted the plaintiff to pay for the whole car, because, as he said, the car was going to be on the track in the morning, and the plaintiff said, "Are you sure that that car is going to be on the track tomorrow?" that Gourley said, "Sure, going to be on the track tomorrow;" that the plaintiff said, "You know what kind of condition that grapes going to be?" that Gourley said, "We got a good shipper in California, so they will be good stuff coming in here;" that he, the witness, said to the plaintiff, "As long as the car is going to be on the track tomorrow, go ahead, pay full," which he did.

After putting in further testimony as to the bad condition of the grapes, the plaintiff rested.

The witness Gourley for the defendant, testified that he was formerly connected with the defendant for about two years, in the capacity of salesman and salesmanager; that he recalled nothing of the conversation with the plaintiff just prior to the writing up of the sales memorandum, but the general sales conversation "that would take place in the purchase of a car of grapes." He further testified that he said nothing about the grapes arriving in Chicago on October 19; that he could not tell exactly, but the defendant probably bought the grapes in question within three or four days of the sale to the plaintiff; that they were bought from Friedman & Mandel, and that the latter bought them from the Kek Company; that during the sale to the

plaintiff, he did not warrant these grapes to be merchantable when they arrived here in Chicago, and that he did not say anything with reference to October 19, or any date that they would arrive in Chicago; that the defendant sold 30 or 40 cars a day, and that each was represented by a card, and that the purchasers looked them over and picked out the cars they wanted to buy; that the purchasers are chiefly Italians, and the cars represent cars en route; that there may be half a dozen grape buyers there at the same time; that they take the cards, which have a sale price on them, and look them over and pick out what they wish; that the cards tell them what it will cost them a lug; that when they get one which they consider average weight, they dicker for the purchase of that car of grapes; that as to the car in question, the plaintiff took the card and looked at it, and then told him that he would purchase it; that he did not make any statement to him as to the merchantability of those grapes when they arrived in Chicago; nor did he tell him that the car of grapes would arrive in Chicago on October 19; that the sales memorandum was made out within ten minutes after the negotiations with plaintiff, on October 18, and given to him before he left the office; that he never saw the word "paid" on the invoice before; that he does not recall having any conversation with the plaintiff between October 18 and 26; that he does not recall any conversation with the plaintiff after the car arrived, but does recall the service of the notice of rescission; that after that notice, the defendant wrote the plaintiff a letter on October 30, 1920, in which the defendant stated that it did not guarantee the arrival or condition, or make any representations other than those expressed in the

invoice.

He further testified that the words "acceptance in transit" have an accepted meaning in the custom of the trade; that is, that the buyer accepts in transit "as is" and assumes all the risk; that a car bought in that way is the buyers, even though the contents should be junk; that the defendant knew nothing about the condition the contents of the car was in; and all the defendant sells under those circumstances is the amount of lugs of grapes specified, regardless of the time of the arrival in Chicago; that no time is specified; that that is the general custom and the accepted meaning of the term in the trade in Chicago; that in October, 1920, he was handling 40 cars a day; that he did not know the condition of the grapes in the car in question at the time of the sale; that he could not say that he remembered any conversation with the plaintiff on October 18; that he did not know what the plaintiff said to him, nor what he said to the plaintiff; that he was positive that he showed the plaintiff the blue card, and that on that date it had the figures, "Date shipped 10/8/20" in blue figures; that he recalls he told the plaintiff that the car was shipped on October 8, although he did not know whether it had been shipped on that date; that that was based on the fact that the invoice mentioned that date; that he did not know whether it was shipped on October 8.

When asked whether he said it was shipped on the 8th, knew whether that was true or not, he answered, "I thought it was." and when asked, "But did you tell Tony it was shipped on the 8th?" he answered, "Yes." He further testified that he did not tell the plaintiff anything about the time of the arrival of the car; the only instructions he gave as to how the sales memorandum was to be made out was from the Sales Card, and he did not tell

the Accounting Department what to write on that card; that that is the custom and that everything is sold that way; that they would make it out without him; that the figures, "Shipping point California 10/8/20" were on there when he gave the paper to the plaintiff; that the defendant gets that date from the people from whom he bought the car. On re-direct examination he stated that if anything exceptional were said he would have remembered, and if he had promised that the grapes would be merchantable, he would have remembered it, and, likewise, if he had stated that the grapes would arrive in Chicago on a certain date; that he had told the plaintiff that the grapes had been shipped on October 8, and the information he had before him at the time he made that statement was the invoice from the people defendant bought the car from; that he did not make that statement with the intention of trying to deceive him. On re-cross examination he testified that the reason the buyer is interested in the shipping date is because he buys for his supplies, and the railroad maintains a schedule for these grapes; that the schedule between California and Chicago is 9 days; that a car shipped on October 8, if there were no delay, would be expected in 9 or 10 days; that the buyer would be governed a great deal by the date of shipment; that about the only question the buyers ask is whether the shipper is reliable, but they do sometimes ask as to when the grapes will arrive in Chicago, and he refers them to the Traffic Department; that they do not ask as to the condition of the grapes; that they do ask as to the date of shipment; that in this particular case the plaintiff asked as to the variety of the grapes; that that is very important; that he asked in reference to the date; that that also would be important; that he did not ask any questions in reference to the arrival or the condition.

One Arata, a commission merchant for 24 years, testified that "f.o.b. shipping point; terms cash; acceptance in transit" meant that you accepted at the point of shipment and assumed the risk of transit; that that is the universal custom in the fruit trade; that it is not customary when the sales memorandum says that it is sold "f.o.b. shipping point; terms cash; acceptance in transit" to warrant that the fruit will arrive in Chicago on a certain date, nor to warrant that the merchandise will be merchantable on arrival in Chicago; that as to a warrant that the merchandise were shipped on a certain date from California, it depends "entirely upon the sale as made, whether there was a date stipulated;" that buyers frequently make inquiries about the car lots they are buying, and sometimes ask when the car was shipped; that a car from California to Chicago generally arrived on the 9th morning; if on schedule time; that if a car is in transit, then it is usually customary to ask when the car was shipped and customary to state on the invoice, that is, the bill that is given the buyer, the date when it was shipped.

One Sck testified that sometimes in dealing with grapes and other provisions, they make a special contract of sale, and that in such a case the rights of the buyer and seller would depend upon what was stated between them, and would depend upon the specific statements and agreements; that it is customary for purchasers of grapes in transit to ask the date of shipment.

One Stoerck testified that he is Vice-President of the defendant Company, and been in the fruit business for the past 18 years; that "f.o.b. shipping point; cash; acceptance in transit" means that as soon as the car number is presented to the buyer, he is supposed to pay for the car and assume all liabilities in transit from that time on; that he buys it for better or worse; that that is the universal and accepted meaning of those

terms in the fruit trade; that the defendant sold to the plaintiff approximately 15 to 18 cars during the past season; that he bought them on the usual and customary terms, that is, which apply to grapes sold en route.

One Boddinghouse, sales manager for the defendant, testified that the term, "f.o.b. shipping point; cash; acceptance in transit" means that the buyer assumes all risk in transit, and whether the car arrives at destination or whether it does not, and regardless of condition on arrival; that fully 70% of all shipments of California grapes are sold in transit; they are never sold on what is called regular terms; that is, giving the buyer the privilege of inspecting the car at destination; that whenever a car is sold cash in transit, no privilege of inspection is allowed, and no guaranty of condition is made; that that was the way the defendant sold grapes during the season of 1920; that it was the usual way of all shippers; that that was the custom of the defendant nearly all the time he was employed by them prior to October, 1920; that if sales were not made on that basis, it would be because, in the judgment of the shipper, the market would pay a higher price for the goods on arrival, or for lack of a market. He further testified that as a general thing it is "usual and customary for a buyer of grapes to inquire as to the date when the grapes have been shipped," and that that inquiry be answered; that the reason for the cash acceptances in transit of the fruit from California is that there is a class of people in the fruit business who are unscrupulous, and when they see a loss staring

them in the face, they will throw up any type of contract they can; for that reason the sellers generally get all cash, or as much as they can. He was asked, "And you would say then that it is in the usual run of business an important consideration whether or not the car has been shipped on a specific day?" he answered, "Generally, yes, it may be to either party's advantage. Yes, there are some sellers that are also unscrupulous."

He further testified that if a car of grapes were sold, and at the time it was stated that the car was shipped on the 8th but the car was not in fact shipped until the 11th, and assuming that the car was properly taken care of, the grapes in good condition, and that the carrier iced the grapes all the way through, it would not make any difference as to the condition of the grapes on arrival whether they were shipped on the 8th or on the 11th. When asked, "If you represent that the car is shipped on a definite date, has the buyer the right to rely upon that or not in the custom of your business?" he answered, "As a general thing, yes."

It seems, therefore, that there was some evidence on all three matters, date of shipment, date of arrival, and quality. That, however, pertaining to the subject of quality, could not of itself be sufficient to justify the verdict. The plaintiff had been in the grape business for a number of years; had bought many cars of the defendant; knew the general way in which that business was conducted; knew that the car he was talking to Gourley about on October 20, 1920, had already been shipped, and must have known that Gourley had no knowledge whatever as to the condition of the grapes in that car, so that, manifestly, what evidence there

then in the face, they will throw us any type of nonsense they can; for that reason the matter generally rest all [illegible] or so much as they can. He was saying, "and you would say that it is in the usual run of business in important consequence how which or not the act has been changed on a specific day?" he answered, "Generally, yes, if may be to either party's advantage. Yes, there are some matters that are also unimportant."

He further testified that it was one of grave moment, and at the time it was agreed that the act was changed on the 8th but the act was in fact changed until the 12th, and [illegible] as good abilities, and [illegible] the way through, it would not make any difference in the results of the [illegible] in the 8th or on the 12th. Then asked, "If you [illegible] the act [illegible] treatment" he answered, "is a material thing, yes."

It seems, therefore, that there was only evidence on all three [illegible] quality. That, however, pertaining to the [illegible] quality, could not of itself be sufficient to justify the verdict. The plaintiff had been in the [illegible] for a number of years; but [illegible] any case of [illegible] defendant; [illegible] the general way in which that business was conducted; [illegible] that the act in question [illegible] Gourley about on Oct[illegible] 17th, had actually been [illegible] dropped, and must have know[illegible] Gourley had no knowledge [illegible] fever as to the condition of the [illegible] unless it was that act, on that, unlessly, what evi[illegible]

is on the subject, although properly submitted to the jury, fails sufficiently to show that the defendant warranted the quality of the grapes at the time they were sold to the plaintiff. It is not reasonable, in view of the evidence of the admitted method of doing business in buying and selling grapes as the plaintiff knew it and as the defendant conducted it, to conclude that it is sufficiently shown that the defendant undertook to represent to the plaintiff, at the time they were making their contract, that the grapes were at that time in good condition, nor is it reasonable to conclude from the evidence, even if such representations were shown to have been made, that the plaintiff relied upon them.

On the subject of the date of the shipment from California, there is practically no conflict whatever in the evidence. The plaintiff says that Gourley told him the car was shipped on October 8, and that it would arrive the next morning. The sales card shows that the date was originally typewritten the 8th, but has above it the figure 12 in ink. Gourley testified, however, that the blue card, which was the one in the office at the time the car was being purchased by the plaintiff, contained the following: "Date shipped 10/8/20" in blue figures; that he recalls he told the plaintiff that the car was shipped on October 8; that although he did not know whether it had been shipped on that date, his judgment was based on the fact that the invoice mentioned that date, and when asked whether he said it was shipped on the 8th, he answered that he thought it was, and then stated that he did tell the plaintiff that it was shipped on the 8th,

but did not tell him about the time of the arrival of the car.

The evidence shows that the car was shipped on October 12, so that on the day the plaintiff undertook to buy the car, it had only been on the way six days, and could not be expected in Chicago before October 21st or 22nd. The plaintiff and his witness Maggio both testified that Gourley, on the 18th, said the car would be in the next day, and that, of course, could not be true if the car was shipped on the 12th. Gourley admitted, when being examined, that he had no present recollection of the conversation with the plaintiff which took place prior to the writing up of the sales memorandum, and could only testify to what in his opinion might have taken place considering the way in which the business was conducted when he was there.

There is no doubt that there was ample evidence to go to the jury to the effect that the defendant, through its agent Gourley, at the time the plaintiff was purchasing the car of grapes in question, represented that the shipment was made on October 8, when, as a matter of fact, the evidence shows that it was not made until the 12th, and, therefore, could not normally arrive in Chicago before the 21st or 22nd. Further, there is no doubt that that representation was of a material fact, and that the plaintiff relied upon it, and although the plaintiff purchased the grapes in transit, and, in the language of the custom, as testified to by the experts, "as is," it was still his right, after the car arrived and was inspected and found to be unfit, to rescind the contract. Gourley, who made the sale for the defendant, testified that the reason the buyer is interested

in the shipping date is because he buys for his supplies, and that the buyer would be governed a great deal by the date of shipment, and about the only question the buyer asks is whether the shipper is reliable, although they sometimes ask as to when the grapes will arrive in Chicago. The witness Arata stated that if the car is in transit, that it is usually customary to ask when the car was shipped, and to state on the invoice the date when it was shipped. Yek also stated that it was customary for purchasers of grapes in transit to ask the date of the shipment, and Teakes stated that the information he got on this sale as to when the grapes were shipped from California was from a copy of the invoice, which represented that the grapes had been shipped from California on October 8. Boddinghouse, the defendant's sales manager, said that as a general thing it is "usual and customary for the buyer of grapes to inquire as to the date when the grapes have been shipped," and that that inquiry be answered, and when asked, "And you would say then that it is in the usual run of business an important consideration whether or not the car has been shipped on a specific day?" he answered, "Generally, yes, it may be to either party's advantage;" that when asked, "If you represent that the car is shipped on a definite date, has the buyer the right to rely upon that or not in the custom of your business?" he answered, "As a general thing, yes."

The Sales Act, Sec. 12, provides as follows:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."

Of course, no particular form of words is essential to consti-

tute a warranty. Van Horn v. Stautz, 297 Ill. 530.

Taking the evidence as it is, in our judgment, it quite sufficiently shows that the defendant, through its salesmanager, represented to the plaintiff at the time of the sale that the shipment had been made on October 8, and, also, that the plaintiff relied on that representation. The testimony of Boddinghouse alone is sufficient to show that the representation was material, and the testimony of the plaintiff himself shows that he relied on that representation. We think the evidence on that subject was properly submitted to the jury, and by itself would be sufficient to support the verdict.

Further, it was proper to submit what evidence there was as to any and all of the alleged representations; the condition of the grapes, when the car would arrive, and the date it was shipped, to the jury for their determination; and, if the proof showed any warranty, such as that of the date of shipment and a breach, that was sufficient to justify the verdict. Sales Act. Sec. 12.

Of course, it is impossible for us to know upon what alleged warranty or warranties the jury based its verdict, and as it was not necessary that more than one be proved, it is sufficient, in considering the matter before us, that the record shows that there was sufficient proof concerning the warranty of the date of shipment and a breach to justify the verdict. The fact that more was alleged in the plaintiff's declaration than was proven, is immaterial as long as sufficient of that which was alleged was proven and made out a cause of action.

There is some contention that the conduct of the plaintiff

did not accomplish rescission. We think, however, that, under Section 69 of the Sales Act, the plaintiff did have the right to rescind, and that his conduct accomplished rescission. The plaintiff, at the very first opportunity, offered to return the grapes, and duly notified the defendant within a reasonable time of his election to rescind, and nothing that he did was inconsistent with that rescission. Sales Act, Sec. 69. We do not think that the evidence shows that the plaintiff so legally accepted the grapes, and did anything in the way of acceptance as the result of purchase as constituted a waiver of the breach of warranty, or barred the right to rescind. Sales Act. Sec. 49. Technically considered, the contract of purchase and sale was executed when the plaintiff bought and paid for the car of grapes; but he had not seen them, nor had the defendant. It may well be that if the grapes, upon arrival, had been of merchantable quality they would have been accepted, but being found to be bad when inspected at the first opportunity, it would be, obviously, unreasonable to hold that the purchase could not be rescinded when based upon a material misrepresentation of the defendant. Sparling v. Marks, 80 Ill. 125.

It is further contended that evidence of the alleged parol warranties was inadmissible as varying the terms of a written contract, and that the memorandum of sale constituted the contract in writing and contained all the necessary terms and evidence of that contract. With that we do not agree. That contention, of course, is immaterial as to the date of shipment, as that appeared on the sales card and the sales

memorandum, and was not denied by Gourley. As to the contract in general, it was made up of certain oral statements made by the plaintiff and by Gourley at the time of the purchase, taken in conjunction with the sales card and sales memorandum, which latter, xxxxxxx xxxxxxx although a receipt showing what he then paid, was evidence, in part, of the contract that was made.

In the case of Vierling v. Iroquois Furnace Co. 170 Ill. 189, cited for defendant, the sales were made by sales memoranda, which were sent to the plaintiff by the defendant and accepted by it. Here, in the instant case, however, obviously the contract was the result of both what was said at the time and the memoranda themselves, and the jury was entitled to consider both those elements.

The contention that Gourley did not have authority to bind the defendant is untenable. The evidence sufficiently shows that he managed and controlled, and conducted the sale of grapes at the time in question for his employer, the defendant. The plaintiff had bought grapes of the defendant through Gourley on various occasions, and on the day in question had bought two other cars, concerning which no complaint was made. The obvious inference from the evidence is that Gourley was fully authorized to act for and represent the defendant in selling the grapes, and making, if he saw fit, representations in regard to the date of shipment, and any other pertinent matters.

It is contended the trial judge erred in ruling that evidence that it was not usual and customary in the grape trade to sell a car of grapes in transit with a warranty either as to date of shipment, date of arrival, or condition on arrival, was inadmissible. Considering the way the case was tried and what the case involved, it was not material nor proper to determine what was not usual and what was not customary, especially as the evidence concerning the date of shipment and date of arrival was affirmative, and of itself sufficient to override any custom that might have existed on those subjects.

It is contended that there was error in the instructions that were given and refused. Twelve instructions were given for the plaintiff, and sixteen for the defendant, and upon examination, they disclose that the jury were instructed elaborately concerning every reasonable aspect of the case. We find no substantial error therein.

After a careful analysis of the evidence and the law, we are of the opinion that there was a fair trial and that we are not entitled to override the verdict of the jury.

The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, P. J. CONCURS
MR. JUSTICE THOMSON DISSENTING: I do not concur in the foregoing decision. The defendant offered evidence to prove that it is not usual and customary in the grape trade to sell grapes with a warranty either as to the date of shipment, date of arrival or condition on arrival. This was for the

purpose of showing that it was not within the apparent scope of the authority of the salesman Gourley to make such alleged warranties. That evidence was proper and in my opinion the trial court erred in sustaining the objections interposed to it.

Furthermore, the uncontradicted evidence is to the effect that the terms on which the plaintiff purchased the car of grapes in question, namely, "f.o.b. shipping point, cash, acceptance in transit," have a well known meaning in the grape trade, and that under the trade meaning of those terms in that business "the buyer assumes all risk in transit, whether the car arrives at destination, or whether it does not, and regardless of condition on arrival." Such is the testimony of the witness Noddinghouse, who has had a long experience in this line of business, and as a fruit grower on the Pacific Coast, and with the Bureau of Markets in the United States Department of Agriculture. The testimony of every other witness who testified on the question is to the same effect. That trade custom affects the rights of the seller and purchaser of grapes sold in transit from California, as between themselves, regardless of the rights a buyer may have against the carrier.

Even if it be assumed that in this case there was a misrepresentation or even a warranty, expressed or implied, that the car of grapes in question had been shipped from the shipping point in California on the 8th and was due to arrive on the day following the sale, the evidence shows without any contradiction that the fact that it was not shipped till the 12th and arrived at much later than was represented, did not affect the plaintiff's bill. When the car failed to arrive on the day following the

sale, the plaintiff did not attempt to rescind. He kept inquiring for the car daily until it arrived. When it did arrive, the plaintiff took possession of it and made no attempt to rescind until he found the grapes were not of the expected quality, and then he attempted to rescind solely because of the condition of the grapes. The majority opinion is to the effect (and in that, I concur) that under the terms of the sale, the plaintiff had no right to rescind for that reason. It was not until the plaintiff consulted his lawyer and he prepared a formal notice of rescission, that any question was raised as to the time of arrival, as a reason for the attempted rescission. But even in the trial of the case, no showing was made to the effect that the time of the arrival of this car had affected the plaintiff in any particular. It is not shown that the plaintiff had lost any sales by reason of the difference in time of arrival, or that there had been any drop in the market. The plaintiff, under the evidence, suffered no damage whatever because of the time of the arrival of the grapes. In my opinion, the judgment appealed from should be reversed.

301 - 28959

DE FOREST BOWMAN,

Appellant,

v.

DR. ANTHONY W. WOOLLEY,

Appellee.

236 I.A. 632

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed December 24, 1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 1, 1923, the plaintiff, De Forest Bowman, obtained in the Circuit Court a judgment by confession on a promissory note, signed by the defendant Anthony W. Woolley. The note was for $550.70, dated August 1, 1922, and payable to the order of Robert Mercer, in four equal monthly installments of $87.68. The judgment entered was in the sum of $408.54, which included $50.00 as attorney's fees. On December 4, 1923, an execution was issued against the defendant, and was returned on December 8, 1923, together with a debtor's schedule, signed and sworn to by the defendant on December 16, 1923. On January 10, 1923, counsel for the defendant served notice upon counsel for the plaintiff that on January 11, 1923, they would move the court to vacate and set aside the judgment, and ask leave to plead to the declaration. The motion was, accordingly, made, and set down for January 27. On that date, the defendant filed a petition, setting up among other things, that he, the defendant "at no time, with his knowledge or consent, signed, executed or delivered to the said Robert

Mercer, or to the said DeForest Bowman, or to any one" the promissory note in question. On the same date, the trial judge ordered that the judgment by confession be opened and leave given to the defendant to plead, and that the judgment stand as security. The defendant pleaded the general issue and three special pleas. Those pleas set up, substantially, that the note in question was obtained by fraud and circumvention. A similiter to the plea of general issue, and replications to the three special pleas, were then filed. There was a trial before the court, with a jury, and a verdict and judgment for the defendant. This appeal is, by the plaintiff, therefrom.

The evidence shows that one Robert Mercer, an agent of the Bankers Life Insurance Company of Des Moines, Iowa, in the summer of 1922, went to the defendant, Dr. Woolley, to solicit life insurance , and as a result, the defendant signed an application and the note in question, and, also, a card showing the receipt of a $10,000.00 policy of life insurance.

Two witnesses were called: Woolley, the defendant, who testified for himself, and one Robert Mercer, who was a solicitor of insurance for the Bankers Life Insurance Company.

The evidenceof Woolley is substantially as follows: That he is a practicing physician and surgeon; that he met Mercer at his, the witness' office, about five times in July, 1922; that Mercer said that the Bankers Life Insurance Company had certain advantages, in that it paid double indemnity in case of accidental death; that he, the witness, told Mercer that he

was carrying $10,000 in the Northwestern of Milwaukee, and, also, had a policy in the Continental Casualty Company; that he could not afford to carry any more, and that he would have to drop some of his insurance if he took Mercer's; that Mercer said it would be worth while; that Mercer said the premium would be $350, and that it would be cheaper than what he was paying; that that was on the first visit; that he, the witness, signed the application; that Mercer said the application would be held until he, the witness, saw the representatives of the other two companies; that Mercer was to do nothing in the matter of getting a policy until he, the witness, told him definitely he had decided to take the Bankers Life policy; that Mercer consented to that; that "While we were still considering the matter, he said he could arrange with his company, to pay in quarterly payments, or monthly, or whatever way I wanted to take it;" that that was said at the time the application was signed by the witness; that Mercer said that he, the witness, was to see the representatives of the companies he held insurance in, and see what he could do, and compare the cost of the insurance, and then decide which he would take; that he, Mercer, said he would hold back the policy until he, the witness, definitely decided to take it, and that nothing further would be done about it until he came back from his vacation; that Mercer requested him to hold back his quarterly premium on the Northwestern policy, which was due on August 19, until he came back; that he, the witness, could apply that on the first installment of his insurance if he decided to take it; that "that was about the third visit," on the occasion of his signing the application; that when signing the application,

he, the witness, said that he had not decided to take out the policy, and he did not want to trouble the doctor; that Mercer said he would not send the doctor until the doctor had called him, the witness, and asked him if he decided to be examined and intended to take the insurance; that he, the witness, said that would be all right with him; that two days after he signed the application, the doctor came up, without being called; that after that he talked with one Delano, of the Northwestern Mutual, and one Fisher, of the Continental Casualty Company, in regard to the proposed policy; that that occurred while Mercer was on his vacation; that after those conversations, and after Mercer returned, about the second week in August, the latter came in with the policy; that he, the witness, told Mercer that he had looked into the matter of the cost of the two companies, and that it was not to his advantage to sacrifice what had accrued to him under those policies, and that he needed the money to pay the premium on the policies he had; therefore, he would not want the new policy; that Mercer then said, "Well, don't pay it until your wife comes back and you discuss it with her, and I will bring the policy if you decide to take it;" that Mercer brought the policy; that he, the witness, had it about two days, and then sent it back to the company; that he did not see Mercer again. The witness was asked, "Did you at any time know that you were signing a promissory note," and he answered, no, that he never intended to sign a promissory note, and never heard of any note in the case until he was called up from some office.

On cross-examination he stated that he had been practic-

ing his profession for eight years; that he graduated from the Medical Department of the University of Illinois, and that prior thereto he attended High School, and spent two years at College; that he signed a printed and filled out application for $10,000 of insurance in the Bankers Life Insurance Company, and when asked, "Did you read that paper before you signed it?" He answered, "I didn't read that paper; it was read to me." and when asked, "It was read to you - all of it?" he answered, "Not all of it." And further, that "that part about the note was not read to me." He further testified that the note in question contained his signature, and when asked, "You did not read the note, either did you?" he answered, "Evidently not." He admitted that when he signed the application, he had an opportunity to read it. He, also, stated that he believed his wife was present at the time he signed it. He further testified that that was on August 1, 1922, the date of the note. He, also, stated that two days after he signed the application he was given the usual examination by the doctor for life insurance.

Cross-examined as to the signature to the receipt on August 22, 1922, for the policy, he first said, "It looks like my signature," then, "I never signed that," then, "It looks like mine," then "I have no recollection of signing it," then, "Yes, it looks like it."

On behalf of the plaintiff, the evidence of one Mercer is as follows: That he was connected with the Bankers Life Insurance Company, and in the fall of 1922, he went to the defendant to get him to take out some insurance; that on that

occasion they went over the policy and the figures upon it, and the defendant said he would like to take it, but he hadn't money to pay for it, that he was carrying $10,000 in the Northwestern Mutual; that he, the witness, told the defendant what the Bankers Life Insurance Company would do, and that he could get the policy for the defendant and the latter could pay for it in installments, or fix up a note; that, accordingly, the defendant signed an application, and he, the witness, had the doctor examine him; that the note sued upon and the application in evidence were both then signed at that time by the defendant; that on that occasion the defendant gave him, the witness, the information that is written in in the application, including his wife's name as beneficiary, and the amount of insurance which he, the defendant, was carrying; that when the defendant told him he could not handle the policy at that time, he, the witness, told the defendant, the Company would take his note and he could pay that way; that he, the witness, toldthe defendant that he himself was going on a vacation, but he would put the insurance in force for him at once; that after he, the witness, returned, about the 20th of August, he went up and delivered the policy, and the defendant held it for several weeks and then returned it; that when he, the witness, delivered the policy, the defendant accepted it and signed the receipt for it; that the defendant said he didn't know at that time how he would be able to pay; that the witness said to him that there was his note, "and you don't have to pay at the present time;" that at the time the policy was delivered to him, the defendant opened it up and they went over it together; that

afterwards, he called up the defendant on the telephone and told him he would have to pay his note, as the company held him, the witness, liable; that the policy is still in force. On cross-examination, Mercer testified that the defendant held the policy from August 22, to about September 8, and that it was mailed back to the Company to the defendant on September 9; that he, the witness, took the defendant's note because the latter said he could not carry a Bankers Life Policy and the one he already had; that there was no question in his, the witness' mind, that the defendant was going to take the policy; that he read the application to the defendant, but he, the witness, made it out,- read everything in it; that he saw the defendant sign the card which was a receipt for the policy, and he, the witness, took it to the defendant for him to sign; that the defendant signed it the day the policy was delivered; that the card was not mailed to him, that he took it there himself.

There was offered in evidence the note, which was dated August 1, 1922, in the sum of $350.70, payable in four equal installments on the first day of each of the following months, September and November, 1922, February and April, 1923. The note was payable at the office of the Bankers Life Company, at Chicago, and was signed Anthony W. Woolley, and payable to Robert Mercer, and endorsed by the latter.

The application, which was offered in evidence, was, also, signed Anthony W. Woolley, and began with the words, "I, the undersigned, do hereby apply for insurance in the Bankers Life Company." It contained, practically, 14 questions,

afterwards, he called up the defendant on the telephone and told him he would have to pay his note, as the company told him, the witness, finding that the policy is still in force. On cross-examination, witness testified that the defendant held the policy from August 5th, to about September 6, and that it was mailed back to the Company in the afternoon on September 7; that he, the witness, told the defendant's wife because the latter said he could not carry a [illegible] life policy and the one he already had; that there was no question in his, the witness' mind, that the defendant was going to take the policy; that he sent the application to the defendant, and [illegible] accepting it; that he saw the defendant sign the note which was a receipt for the policy, and he, the witness, took it to the defendant for him to sign; that the defendant signed it the day the policy was delivered; that the note was not mailed to him, that he took it there himself.

There was offered in evidence the note, which was dated August 1, 1922, in the sum of $220.75, payable in four equal installments on the first day of each of the following months, September and November, 1922, February and April, 1923. The note was payable at the office of the Business Life Company, at Chicago, and was signed Anthony E. Kealley, and payable to [illegible], and endorsed by the latter.

The application, which was offered in evidence, was, also, signed Anthony E. Kealley, and begins with the words: "I, the undersigned, do hereby apply for insurance in the Business Life Company." It contained, practically, 14 questions

and certain sub-questions, all of which were answered, and many of which could be answered only by getting special information, such as "Date and place of birth." "Are you a naturalized citizen?" "If of conscription age, were you passed by the medical board for service?" and so on. There was a question in regard to insurance which he carried at the time, and which was answered to the effect that he had a $10,000 policy, taken in 1920, in the Northwestern Mutual. The application was dated August 1, 1922, witnessed by Robert Mercer, and some one else, whose name purports to be shown on the photostatic copy, but is illegible.

There was offered in evidence, also, a document as follows: "NOTICE - This card should be signed by the Insured and mailed immediately upon receipt of Policy 8/22/22. Received of BANKERS LIFE COMPANY, of Des Moines, Iowa, my Policy No. 544065 which is accepted as issued. (Sign here) A. W. Woolley. Town, Chicago; State, Ill."

There was, also, offered in evidence what is called a continuation of the application, which contains the answers made by the defendant to the medical examiner. In that, appears the usual series of questions as to the physical history of the defendant, and his pedigree. That document is dated August 1, 1922, and is signed by the defendant, and, also, by the doctor as a witness.

As "Every negotiable instrument is deemed <u>prima facie</u> to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party

thereto for value," (Sec. 24, Chap. 98, Negotiable Instruments, Cahill Rev. Stat. 1923) the plaintiff made out a prima facie case by the introduction in evidence of the note and endorsement thereon. But, as the defendant was given permission to plead to the declaration, on motion and affidavit, the judgment being opened up and allowed to stand as security, he was not only bound to make out a defense, but to prove, by a preponderance of evidence, the fraud and circumvention which he charged in his pleas. George J. Cook Co. v. Plasano, et al. 174 Ill. App. 609; Commercial State Bank v. Folkerts, 208 Ill. 385. Pursuant to that prodedural obligation, the defendant undertook to prove that there was fraud in the inception of the note sued upon. The jury found in his favor and the question arises, was that verdict against the manifest weight of the evidence. We think it was.

The defendant signed five documents, all of which tend to confute his testimony. The theory of his testimony is that when he signed the application he had not decided to take out the policy, and that the application was to be held until he, the witness, interviewed the representatives of two other insurance companies, and that Mercer, the agent, was to do nothing in the matter of getting the policy until he, the defendant, told him definitely he had decided to take it; that he did not read the application; that part of it was read to him, but not that about the note, although he had an opportunity to read it; that he did not at any time know that he was signing a promissory note, and that when he received the policy from Mercer, he held it about two days, and then sent it back to the Company.

Looking at the note in the record, the text of which begins with the words, "For Value received, I promise to pay to the order of Robert Mercer," etc. and the signature, "Anthony W. Woolley," the whole document being short and simple, it hardly seems conceivable that it could be signed by an educated, professional man without knowing that it was a promissory note. And the same is true of the application, also the document entitled, "Answers made to the Medical Examiner." Then, too, there is the receipt dated August 22, 1922, the text of which is, "Received of Bankers Life Company of Des Moines, Iowa, my policy No. 544084, which is accepted as issued," and which is signed, " A. W. Woolley, Chicago, Ill." Thus it will be seen that, in addition to the note, he signed the application, which recited that he had given the note to Robert Mercer, agent, for $350.00, to cover the first premium; that he signed the document containing the questions of the Medical Examiner and the answers he gave thereto; that he received the policy, and signed a receipt, which recited that it was his policy, and was accepted as issued.

The testimony of the defendant that he told Mercer that he had looked into the matter of the cost of the two companies, and that it was not to his advantage to sacrifice what had accrued to him under those policies, and that he needed the money to pay the premium on the policies he had, and, therefore, he would not want the new policy, and that Mercer then said, "Well, don't pay it until your wife comes back and you discuss it with her, and I will bring the policy if you decide to take it," and that Mercer brought the policy, and that he, the defendant, kept it about two days, and then sent it

back to the Company, is not consistent with the admitted fact that on August 23, 1922, he signed a receipt for the policy, reciting that it was his, and that it was accepted as issued, and signed his name to that statement of facts, and the policy kept for about three weeks.

It may well be, that from the beginning, the defendant entertained, with some reluctance, the consideration of taking out a new policy, and thought that even though he signed the various papers and was examined by the doctor, he might still, if he so desired, escape responsibility for the note. But that is no defense. The evidence shows that he is an educated, professional man, and the inference, from his conduct, is irresistible that he knew what he was doing when signing the note and the various papers in evidence.

In Dickinson v. Dickinson, 305 Ill. 521, the Court said:

> "A party in possession of his mental faculties is not justified in relying on representations made when he has ample opportunity to ascertain the truth of the representations before he acts. When he is afforded the opportunity of knowing the truth of the representations, he is chargeable with knowledge. If one does not avail himself of the means of knowledge open to him he cannot be heard to say he was deceived by misrepresentations." Rockford Ins. Co. v. Warne 22 Ill. App. 19.

The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, J. CONCURS;
O'CONNOR, P.J. DISSENTS.

Back to the Company, he not consistent with the contract that on August 22, 1922, he signed a receipt for the policy, realizing that it was his, and that it was accepted as issued, and signed his name to that statement of facts, and the policy kept for about three weeks.

It may well be, that from the beginning, his actions and understanding, with even reluctance, the consideration of taking out a new policy, and thought that even though the signed the written proposal was constant by the Company, he might still, if he so desired, merely cancel/discontinue the act. But that is no defense. The evidence shows that he is the insurer, particularly and the Company, from the market, it irrelevantly that he knew what he was doing when signing the late and the written proposal in evidence.

In Hardiman v. Insurance, 84 Ill. 421, the Court said:

> "A party in possession of his mental faculties is not justified in relying on representations made when he has ample opportunity to ascertain the truth of the representations before he acts. Nor is he allowed the opportunity of learning the truth of the representations, he is not careless with impunity. If he has the means of knowing the truth of the representations, he is not justified in relying on them, or any of them, if they are contradicted by other statements." Insurance Co. v. Hunt, 23 Ill. 454, 457.

The Judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Presiding, J. Dissenting,
Concurring, J. Concurring.

381 - 29039

ELECTRIC SERVICE CONSTRUCTION CO.,
a corporation,

Appellee,

v.

WALTER GORMAN,

Appellant.

236 I.A. 632

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed December 24,1924.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On May 17, 1923, the plaintiff, Electric Service Construction Co., a corporation, brought suit against the defendants, Electrical Dealers' Supply House, a corporation, Radio Chain Stores, and Walter Gorman, for $138.91, for goods sold and delivered and on an account stated. On May 26, 1923, a general appearance was entered for defendant Walter Gorman, and a special appearance for the "Electrical Dealers' Supply House," Alfred A. Wohlgezon, Louis Frankel and Gustave Frankel, doing business as Radio Chain Stores. The special appearance recited that it was filed for the purpose of contesting the jurisdiction of the court, and subsequently, upon motion of the defendants, service of summons was quashed as to the defendants Electrical Dealers Supply Co. and Radio Chain Stores. On May 29, 1923, the plaintiff filed an amended statement of claim, which recited "That its claim was for $138.91, for merchandise sold and delivered to the defendants for $88.91, and $50.00, which defendants, though often requested, had failed to pay." On June 5, 1923, on motion of the plaintiff, "Electrical

Dealers' Supply House" and the Radio Chain Stores were dismissed out of the suit. On June 18, 1923, the cause was tried before the court, without a jury. At the close of the trial, the court found the issues against the defendant Walter Gorman, and assessed the plaintiff's damages at the sum of $138.91. Judgment was then entered for that amount in favor of the plaintiff and against the defendant Walter Gorman. This appeal is from that judgment.

The evidence shows that the plaintiff delivered to the defendant Walter Gorman certain merchandise, consisting of two radio sets. The question which arose at the trial was, whether the defendant was liable as a purchaser for that merchandise. The plaintiff offered in evidence a written statement in the nature of a bill, dated December 4, 1922, which recited that it had sold to Walter Gorman of 4441 West Washington Street, and shipped to him there, a 1 Three Tube Granger Duophone Receiver. At the bottom of that document were the words, "Received by Walter," the word Walter having been written thereon by the defendant. There was also offered in evidence another written statement in the nature of a bill, dated December 1, 1922, which recited that the plaintiff had sold to the defendant, of 4441 Washington Blvd., certain radio merchandise, for $132.00. That memorandum contained the following: "Above subject full credit on return December 2nd, '22." It also contained the following: "Received by W. Gorman," and the words, "Do not bill."

The witness Moore, President of the plaintiff corporation, testified that he discussed the purchase of the set referred to in the bill of December 1, 1922, with the defendant Gorman, and told him the extreme discount would be 35%; that

the defendant said he wanted the set because hiswwife wanted one; that he, the witness, gave the set to the defendant to take home, and said to him, "If she is not satisfied you bring it back tomorrow and it will be all right;" that the set was never returned; that as to the other set referred to in the statement of December 4, 1922, the defendant came in and said, "Let me take that outfit to try;" that he, the witness, went out with the defendant to the defendant's house; that he told the defendant that he could not operate a radio set the way he was trying; that he asked the defendant which one he, the witness, should take back; that the defendant said, "Neither one, because I have this duophone sold to a friend and the other I'll take down to the Electrical Dealers and sell it there or through the Radio Chain stores;" that he afterwards saw it exhibited there; that he told the defendant the price of the duophone was $50.00 flat, although the list price was $100; that he asked the defendant several times what he was going to do, and the latter said he had taken the instruments down to the Electrical Dealers and they would dispose of them; that around the first of the year he asked the defendant when he was going to settle for the equipment he had at the house, and the defendant said, "he was taking it to the store and would pay for it right away as soon as he got the store check;" that in April, the defendant promised to give him a check the next day; that in March, 1923, he had a conversation with the defendant, in which the defendant promised to bring a check. The bookkeeper and office manager for the plaintiff company, one Wichser, testified that he talked with the defendant in March, April and May, 1923; that in the first conversation he asked the defendant to send a check on account

and that the defendant said he would take it up; that in the conversation immediately prior to the beginning of the suit, the defendant said, "Well, I'll come down tomorrow morning and bring a check."

The defendant testified that he called at the plaintiff's place of business, and Moore told him he had a set that was a "cracker-jack;" that he would let him, the witness, take it home on approval, as he felt sure it would work to the witness' satisfaction; that he took it and signed for it; that he, the witness, wrote on the receipt the words, "Do not bill;" that he told Moore he did that "because I do not expect to have any trouble with this particular signature on this receipt if it doesn't give me the service I want;" that Moore said that was satisfactory to him; that the instrument did not work; that when he obtained the second set Moore said in regard to it, "Take this set back and I, myself, will stop in and see that it does work;" that Moore called and tried for three-quarters of an hour to tune in, but could not get anything out of the instrument; that the witness said, "Moore, will you take that back, or shall I bring it down?" that Moore said, "Bring it down and when we go by the place we'll pick it up;" that he did not see or hear from Moore for three or four days; that when he did, Moore said he was getting in some more sets that were supposed to be very fine and he would give him, the witness, a set. As to the set mentioned in the statement of December 4, 1922, the witness testified that he received it, but that Moore said, "Here is a set that will give you a little service but not what you want; take this home, maybe it will please you;" and that he took it home. He fur-

ther testified that he had a conversation with Moore about the "Memo Chge," and that Moore said he would bill them as a matter of record; that he received a letter dated March 30, 1923, from the plaintiff, stating that there was charged personally against him certain items making up the $138.91, and containing the words, "Will you kindly advise if agreeable to remit us this account;" that when he received that letter, he called up Moore and told him that he, the witness, had those sets at the store, and asked Moore why he did not send for them; that Moore said for him to send them over, and a few days later he took the two sets to Moore's place of business and Moore refused to accept them; that he received plaintiff's statement dated December 4, 1922, for $88.91, for one of the sets; that he then called at Moore's place of business and told him he did not see why Moore did not pick it up; that he, the witness, never paid the bill and never received the bill for the $50.00 set, and that he had no conversation with Moore as to what the price of the second set was to be. On cross-examination he testified that he did not buy the second set; that he took it without knowing what the price was; that he did not get it until December 4; that he did not remember whether the words, "Above subject to full credit on return December 2nd, '22" on the statement of December 4, 1922, were on there when he signed it or not; that he still has the merchandise in question in his possession.

Two contentions are made on behalf of the defendant: first, that the trial court erred in overruling the motion of the defendant in arrest of judgment; and, second, that the

judgment is manifestly against the weight of the evidence.

First. It is true that the suit was originally begun against three defendants, and that a general appearance was entered for Walter Gorman, and a special appearance for "Electrical Dealers' Supply House," Alfred A. Wohlgezon, Louis Frankel and Gustave Frankel, doing business as Radio Chain Stores, but in the course of the trial, at the close of the plaintiff's case, the record shows that counsel for the defendant made a motion to dismiss all of the defendants out of the case, with the exception of Walter Gorman, and that the motion was allowed; and that, afterwards, the defendant proceeded to put in his evidence. That was all regular, and the action of the trial judge thereafter in entering judgment against Walter Gorman alone, was, also, entirely regular, and, as a matter of procedure, correct.

Second. Counsel for the defendant argue that the judgment of the trial judge is against the clear preponderance of the evidence. That argument is based, apparently, chiefly on the testimony of the defendant Gorman. Counsel urge that his entire testimony shows that he did not equivocate, but gave clear, concise and correct answer to all questions put to him, and calls the court's attention to the bill, or statement, dated December 1, which contains the memorandum, "Above subject to full credit on return December 2nd, '22," and to the expression, "Do not bill." The argument, however, in favor of the contention of the defendant, shows that there was a conflict in the evidence, but it does not demonstrate, as the record now appears before us, that the plaintiff failed to prove his case by a preponderance of the evidence. The evidence of Wichser is positive to the effect that in the early

part of 1923, the defendant said that he would give a check for the merchandise. Moreover, the evidence of Moore, the president of the plaintiff corporation, is to the effect that in March, 1923, he had a conversation with defendant in which the latter promised to bring the check.

As to the memorandum, "Above subject to full credit on return December 2nd, '23," Moore testified that that meant if the defendant returned the article the following day he would then get full credit, but that it was not returned. There may be some discrepancies, but that is usually true where the evidence is conflicting, as it is here. We have carefully examined all the evidence in the record, however, and have come to the conclusion that it would be unreasonable, especially in view of the fact that the trial judge saw the witnesses, to override his judgment.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

281 - 23919.

AUGUST W. FISCHER, Administrator of the Estate of Margaret Fischer, Deceased,

Appellee,

v.

JOHN TRAUBCHT, JR.,

Appellant.

236 I.A. 632

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY

Opinion filed December 24, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, Traucht, seeks to reverse a judgment for $2,500.00, recovered against him by the plaintiff Administrator in the Circuit Court of Cook County, in an action brought by him to recover damages alleged to have been suffered as a result of the death of the plaintiff's intestate, who was his wife. It is the plaintiff's contention that his wife's death resulted from injuries received by her when she was struck by an automobile driven by the defendant.

The incident involved in this case happened shortly after eight o'clock on a March evening, at the corner of South Halsted street and Garfield Boulevard, in the City of Chicago. At this point Garfield Boulevard is made up of two roadways. The north roadway is used by the west bound traffic and the south roadway is used by the east bound traffic. In the center of the south roadway and at a point a few feet west of the crosswalk over that roadway, at the east side of Halsted street, there was a safety-island on which there was an electric street lamp. All the evidence is to the effect that this corner was

well lighted. There was a drug store situated at the southeast corner of the intersection.

At the time in question, the plaintiff and his wife had been walking north along the east side of Halsted street. When they reached the end of the sidewalk at the south side of the south roadway of the Boulevard, the plaintiff testified, he looked east and west along the roadway, and that his wife also turned her head to the west, and that he saw no vehicles approaching. He and his wife then proceeded across the roadway in a northerly direction, the plaintiff being to the east and his wife to the west, as they walked across the roadway. The plaintiff testified that when they reached a point a few feet to the southeast of the safety-island, his wife was struck by an automobile, which came in contact with her left hip, and both the plaintiff and his wife were knocked down.

The defendant, a young man 21 years of age, accompanied by one Ferrand, a friend about his own age, who was sitting beside him on the front seat, was driving a seven passenger Peckard touring car, north in Halsted street. It was a misty, rainy evening but the plaintiff and his wife were not carrying an umbrella. The side curtains were all in place on the automobile, except the one in front on the left hand side beside the defendant, who was driving the car. When he reached the Boulevard he came to a stop, just south of the cross walk over Halsted street at the south side of the Boulevard. He then proceeded into the Boulevard, making a wide turn to the east, going out into the roadway to a point a few feet south of the safety-island, and just after passing the island he collided with the plaintiff's wife. After the collision, the defendant

ran his car fifteen or twenty feet in a southeasterly direction over toward the side of the roadway, where he stopped. Neither the plaintiff nor his wife were run over by the automobile. They were assisted into the drug store, after which the defendant took them in his car to a doctor's office several blocks away, and after the plaintiff's wife, who was the only one injured, received some attention there, the defendant took them both to their home.

The plaintiff's wife was a woman sixty-three years of age, about five feet nine inches in height and weighed 185 pounds. Up to this time she had always apparently been in good health. She had always done all of her own house work. As a result of this collision, she received a bruise on her left hip and her leg swelled up to about twice its normal size, from the hip to the knee; there was also some injury to theleft ankle, but apparently this did not amount to much. As soon as the plaintiff's wife was taken home, she was put in bed and poultices were applied to the bruised area on her hip. Her husband testified that the swollen condition, described above, continued; that she felt considerable pain and slept poorly; that during the first two weeks she left her bed now and then, with some assistance, but would stay up only a short while, and that during the following two weeks she was confined to her bed continuously. She died about four weeks after she received her injuries, and it appears from the record that her death came suddenly and without any indication that it was approaching.

In support of his appeal, the defendant contends that the evidence fails to disclose any negligence on his part

and also that the deceased and her husband were guilty of contributory negligence, both as a matter of fact and as a matter of law. The plaintiff testified that before he and his wife started across the roadway he looked both ways and saw nothing approaching and heard nothing. The fact that no horn or other warning signal was sounded by the defendant, is not disputed. The defendant testified there was no occasion to sound his horn, and his companion testified that no horn was sounded. The plaintiff testified that in crossing the roadway he and his wife went at a regular walk; that they were not going slowly nor were they hurrying. One O'Neil, who was walking along the east side of Halsted street, a little way behind the plaintiff and his wife, testified that he saw them going across the roadway and he saw the plaintiff's automobile come up from the south and stop at the Boulevard crossing and then start up and turn east into the Boulevard; and as it turned into the Boulevard, it made a wide turn and was going slowly,- about five miles an hour. He gave it as his impression that the deceased was struck by the automobile's bumper or fender, at the right hand side of the car. One Coverly witnessed the collision from the drug store window. He testified that the left front fender of the automobile struck the deceased, and knocked her and the plaintiff down; that as they were struck, they were "moving perfectly natural * * * they did not hesitate or jump either way, only walked." He further testified that they appeared to be hurrying and that he did not see them before the machine struck them; that the first he saw was when the left hand fender of the automobile came into contact with the deceased. There is no doubt of the fact that it was the left hand

fender rather than the right which struck the deceased, for she and her husband were knocked down toward the northeast, and thecar cleared them and passed to the south of them.

The defendant testified that he made a long turn going into the Boulevard; that the wind-shield was clear, as his companion had just drawn a squeegee across it before he started into the Boulevard; that he was going about four or five miles an hour, and he noticed the plaintiff and his wife when he was about ten feet from them; that at that point he had gotten out into the Boulevard and was driving his car directly east and the plaintiff and his wife were walking north; that the front of his car cleared them, when they suddenly stepped back into the left front fender of the car; that if they had not stepped back he would have cleared them. The defendant's companion, Farrand, testified that as the car made the turn into the Boulevard he was looking into the drug store and did not see the plaintiff and his wife, nor did he know that anything had happened until the defendant remarked that he had hit somebody. He testified that the car was going about four or five miles an hour.

On this testimony, the question of whether the defendant was negligent or not was one for the jury, and it would be impossible for this court to say that the conclusion of the jury, to the effect that the defendant was guilty of negligence, was against the manifest weight of the evidence. According to the plaintiff's witnesses, he and his wife had not cleared the path of the car at the time the deceased was struck. At the rate at which the defendant was driving, he testified he could stop "almost immediately, probably in a couple of feet."

He also testified that he saw the plaintiff and his wife when they were ten feet away. If they were not clear of his pathway at that time, and they were not, if the testimony of the plaintiff's witnesses, as to the facts of the collision, was correct, and the jury may have so believed it, the defendant was negligent in not stopping his car before striking the deceased. He, of course, had no right of way over her and had no right to rely upon her jumping out of the way.

Likewise, in our opinion, the question of the contributory negligence of the deceased was a matter for the jury to pass upon. No point is made of contributory negligence upon the part of the plaintiff, but the same would be true of that also. In an apparent effort to establish contributory negligence on their part, counsel for the defendant brought out on cross-examination of O'Neil, and also the defendant's direct examination, that as the automobile made the wide turn into the Boulevard, it reached a point where it went directly east and at that point was a "substantial" distance away from the point of collision, and the argument is that the deceased and her husband apparently made no effort to look out for vehicles coming from the west, which was the direction from which traffic was to be expected on this roadway, but that after leaving the sidewalk they went directly across to the north and kept looking to the north, whereas if they had exercised the proper care in keeping a look out for vehicles from the west, they would have seen the defendant's car and avoided being struck. Certainly the evidence is not such that it could be said that the deceased and her

husband were guilty of contributory negligence, as contended for, as a matter of law, nor, in our opinion, would this court be justified in holding that the finding of the jury, to the effect that they were in the exercise of a proper degree of care, as a matter of fact was against the manifest weight of the evidence. The evidence is that the deceased was struck after she and her husband had proceeded twenty or twenty-five feet from the point where they stepped off the sidewalk. The evidence further is that when the defendant stopped his car south of the Boulevard, he was in the northbound street car track in Halsted street, and fifteen or twenty feet south of the point at which the plaintiff and his wife stepped off the sidewalk into the Boulevard roadway. That would place the automobile between thirty-five and forty-five feet south of the point of the collision and twenty or twenty-five feet west of that point, at the time the defendant started up his car to turn into the Boulevard. It was for the jury to determine, from all the evidence, whether or not, under such a situation, the deceased and her husband should, in the exercise of ordinary care, have observed the defendant's car as it approached them, in time to avoid the collision. As already stated, we are of the opinion that the evidence is not such as to warrant this court in disturbing the verdict.

The defendant contends further that the trial court erred in the admission of improper evidence, in that two physicians called as witnesses by the plaintiff, were permitted to testify on the question of embolism, although an objection was interposed to the effect that there was no evidence in the record to show that any such thing was present in this case.

An autopsy was performed on the body of the deceased, by a Dr. Mitchell, who testified that the organs in the chest cavity were normal except that the heart showed a slight myocarditis; that there were some adhesions about the gall bladder and transverse colon; that there was an area of discoloration situated on the left thigh, and upon opening that area, there was an exudation of fluid and blood, and that it was very difficult to diagnose the condition involved in the bruise on the thigh. This witness was asked whether or not he had an opinion, based on a hypothetical question, as to whether the injuries the deceased received at the time of the automobile collision, might or could have caused her death, and he replied that he did have an opinion, and it was that there might have been a causal relationship between her death and the history of her injuries as set forth in the hypothetical question, and that he based his answer on the fact that there was a pre-existing myocarditis associated with trauma. He further testified to the effect that the bruise on the thigh might have been the result of occlusion or the blocking up of a blood vessel or the deterioration or degeneration of blood, or just the average hemorrhage caused by the flow of blood to a certain point; that it was most difficult to state which it was, but it might have been any one of the three. The first of these possible conditions involved an embolism, and he then went on to testify that if there was an embolism, it could not have produced immediate death because it was not located in a vital part, but that it could be associated with the history of the injury, as stated in the hypothetical question. It was at this point that objection was first made, to the effect that there was

no evidence in the testimony, to suggest an embolism, "and whatever evidence there is, is too remote and speculative to permit an answer." As we read the testimony of this witness, it was to the effect that the bruise he found on the thigh, might have been occasioned by any one of three conditions, one of which was an "occlusion or blocking up of the blood vessels in the left thigh," which would involve an embolism. This witness further testified that it was of the utmost difficulty to differentiate and determine whether this condition on the thigh "was an embolism or merely an occlusion of the blood in that part." He also said it might have resulted from some damming of the vessel at the point indicated and he explained that this involved an embolism,- "the dam is the embolism." He further testified that, unless this bruise would be followed by complications, it, in itself, would not be sufficient to produce death; that following such a bruise there might be an embolism to the vital sections of the body and that therefore the injury might be sufficient shock to the system to produce death. He further testified that in a post-mortem examination, where death has been produced by embolism, the embolism is not always found,- "if the embolism involves a primary vital area and later becomes absorbed, although that area becomes degenerated, the effect of the embolism would be to cause death, although the embolism itself would have departed." On cross-examination Dr. Mitchell testified that he did not find any embolism, either in the heart of the deceased or anywhere in her body, but that he found, underneath the skin on her thigh, a condition which might have resulted from three different causes,- from blood in the tissue or degeneration

of blood in the tissue, "or it might have resulted from some damming of the vessel at the point indicated." On cross-examination Dr. Mitchell further testified that myocarditis of itself might produce death without any injury, "but that a myocarditis which pre-exists an injury, if the injury is of sufficient character to aggravate the condition, may in association with the injury, in some manner, be one of the factors in the production of death;" that if the woman referred to in the hypothetical question was injured by an automobile, and had a myocarditis, and if she sustained shock as a result of the automobile accident, and if the myocarditis was aggravated or affected by that shock, its effect would "probably" be immediate; that after thirty days, when one has probably begun to recover from the injury, "we don't expect to find that shock as important a factor in heart trouble previously acquired as it would have been immediately at the time of the accident." This is not saying, as counsel for the defendant argues in his brief, that if the myocarditis was to be aggravated by the effects of shock as a result of the collision, that effect would be immediate. The most that this witness said in his testimony was that it "probably" would be immediate, and that the shock would not be expected to be as important a factor thirty days after the injury as it would be immediately after the accident. This witness also testified that the adhesions he found in the gall bladder and the transverse colon, might have had an effect in this case, but that the effect would have been a secondary one rather than primary.

Another witness, called by the plaintiff, Dr. Wells, who had no connection with the treatment of the deceased, reply-

ing to a hypothetical question, stated that in his opinion the injury received by the woman described in that question, could have produced her death a month after her injury, and he stated that his reason for his opinion was that "all of the essential conditions of death by a certain condition, known in connection with traumatic surgery as embolus" had been mentioned in the hypothetical question put to him. The witness was asked whether he had any other reason for his opinion, to the effect that there might have been a causal connection between the injury and the death, and he answered, "Yes, because you have given a contributing and auxiliary cause, also, in addition to the likely one." He was then asked what the contributing cause was and he answered, "The existence of a cardiac or heart pathology of some degree" and "a confirmatory physical finding concerning the condition in the thigh which made the formation of an embolus probable." This witness was then asked whether he had an opinion as to whether when a death is caused by embolus, the embolus may always be found on post-mortem examination, and he answered that it may or may not be found; that the embolus may be very small,- it may be almost microscopic; "It may not be anything of a demonstrable character, observable, the embolus being found by a post-mortem section of the heart, but its presence as a foreign body, a thing that the heart is so unused to, is sufficient to interrupt the cycle of the heart's action and particularly if it is a myocardiac heart, which is an irritable heart and which has a pathology in there and subject to reaction more than a healthy heart."

From the foregoing testimony it will be seen that although the doctor who performed the autopsy did not find an embolism, either in the heart or any part of the body of the de-

ceased, one might nevertheless have been present, for the autopsy might or might not reveal an embolism, even though one were present. It further appears from the testimony of the doctor who performed the autopsy on the body of the deceased, that it was difficult to diagnose the condition found in the area described as the bruise on the left thigh; that in his opinion it might be occasioned by one of three causes, one of which was the damming of the blood vessels, which involves an embolism. It is further apparent from the testimony that if that were the condition present it would not bring about death, immediately, because the condition did not effect a vital part, but that death would occur when the embolism did reach a vital part, which the doctor testified might be the heart or the lungs or the upper part of the spinal cord or the brain, and the testimony was further to the effect that when an embolism reached such a part death would be sudden. In our opinion, on this evidence, there was sufficient proof of the possibility of the presence of embolism to warrant the trial court in overruling objections to questions propounded to the physicians on that subject.

It is contended that the death of the plaintiff's intestate was not the result of the injuries she received at the time of the collision with the defendant's automobile. It was clearly the opinion of the witnesses who testified on the subject that there might have been a causal connection between the injuries and the death. It was for the jury to say whether, on that testimony, and testimony to the effect that the deceased had always been in apparent good health up to this time, and was practically continuously confined to her bed

after the injury, and all the other evidence in the case, the injuries received by the deceased at the time of the collision did, in fact, contribute to bringing about her death. We cannot say that the finding of the jury, to the effect that they did, is against the manifest weight of the evidence.

The defendant further contends that the damages awarded by the jury are excessive, and that counsel for the plaintiff made improper remarks in connection with his argument to the jury. We do not consider the damages excessive. The remarks of counsel, which are complained of, in our opinion were not improper. In connection with his argument, counsel referred to the fact that the plaintiff was lame. Ordinarily, it is improper to argue in such a case as this, or to show that next of kin are crippled or are poor. However, in the case at bar counsel for the defendant had attempted to show that the deceased had been an unusually hard worker, not only attending to the usual duties of a housewife but even doing such work as painting and decorating in the apartment where she and her husband lived, and apparently an attempt was made to show that she had been little short of a slave, and that this is what had broken her down and brought about a myocarditis and caused her death. In replying to that line of contention, counsel for the plaintiff remarked that it was quite probable that the duties of the deceased had been rather greater than usual, by reason of the fact that her husband was lame, and for that reason was not in a position to do as much as he might have otherwise done. The remark was, in our opinio quite harmless and inconsequential. The plaintiff was in court

and whatever lameness he had was apparent. Reference had been made two or three times during the testimony to the fact that as the plaintiff and his wife, passed over the roadway she had hold of his left arm, as he was lame on that side. In the course of the argument to the jury counsel for the plaintiff also referred to the fact that strictly, under the law, the defendant was an incompetent witness in the action brought by an administrator of the estate of the deceased, but that his incompetency had been waived and he had testified. This was a matter quite outside the province of a jury and it should not have been mentioned. Objection was interposed to the remark and while not formally sustained, the remarks of the court were such as to indicate that, without question,- the court remarking that the point had been waived and the testimony was in and "that is sufficient."

We find no error in the record and the judgment of the Circuit Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

273 - 28931

JAMES ABBATOIR RENDERING CO.,
Appellee,

v.

MORRIS KAPLAN,
Appellant.

236 I.A. 633

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed December 24, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $1400.00, recovered against him by the plaintiff in the Superior Court of Cook County. The action brought by the plaintiff was one for fraud and deceit. In the declaration filed, the plaintiff set up a contract by the terms of which it purchased from four to five car loads, of about twenty tons each, of dry tannery waste hair, free from lime, at $32.00 per ton, f.o.b. cars, at Alpena, Michigan. The contract provided that "analysis" was to be "like sample submitted and filed with Illinois Chemical Laboratory." After setting up this contract in the declaration, the plaintiff alleged that the defendant, at the time the contract was entered into, submitted a sample which was free from lime, and falsely and maliciously represented that the merchandise would correspond with the sample; and that the defendant deceitfully and fraudulently, and intending to induce the plaintiff to purchase the same, warranted the said hair to be like the sample and packed up fairly and without deceit, and to be good and

Opinion filed December 24, 1924.

merchantable, which said representations were when so made by the defendant, well known by him to be false and untrue. The declaration further alleged that the plaintiff relied upon the representations and warranties of the defendant, who then and there obtained from the plaintiff $1400.00 as a deposit on the purchase price of said waste hair; that the hair was deceitfully packed and was not dry tannery waste hair, and free from lime, but that the material delivered by the defendant under this contract "was principally composed of dirt, rubbish and earth," to the knowledge of the defendant; and that upon discovering the fraud, the plaintiff immediately rejected the shipment and demanded a return of his money, which was refused. The defendant filed a general demurrer to this declaration, which the court overruled, after which the defendant filed a plea of not guilty and went to trial before a jury, on the merits.

In support of his appeal the defendant first contends that the trial court erred in overruling his demurrer to the plaintiff's declaration. Any point the defendant may have had in that regard was waived when he thereafter filed a plea of the general issue and went to trial on the merits. The defendant further contends that the proof submitted by the plaintiff, and on which the judgment appealed from was entered, is based on a theory different from the one set forth in the declaration. The plaintiff submitted evidence tending to show that prior to the time the parties entered into the contract in question the defendant submitted a sample composed of waste tannery hair, and the contract was entered into on the

basis of that sample. Sometime later the defendant called at the office of the plaintiff and handed him invoices for four car loads of the material covered by this contract, and stated that he had shipped the material as indicated by the invoices, and requested a check in payment. The plaintiff's evidence further tends to show that at this time the defendant submitted what is referred to as a shipping sample, from each of the four cars; that the plaintiff's president looked over these samples and asked if they represented just what had been shipped and the defendant answered him that they did, whereupon, the defendant was given the plaintiff's check for $1400.00. The plaintiff's evidence tends to show further that these so-called shipping samples were sent to Gascoyne & Co., of Baltimore, pursuant to a provision of the contract reading: "Chemists: Gascoyne & Co., Baltimore, Maryland, at expense of party not sustained," and further that the contents of the shipment had some hair in it, but could not be classed as ordinary waste hair,- it was full of dirt, sand and lime, but very little hair and the hair present was in a sort of decomposed condition. The plaintiff re-sold these cars to the International Agricultural Corporation, at Cincinnati, Ohio, which rejected them upon arrival there, the plaintiff advising the defendant of such rejection. In our opinion, there was no substantial variance between the declaration and the proof. The declaration might well have been drawn more accurately and more in conformity with the general course which the proof was to take, although of course it was neither necessary nor proper for the plaintiff to plead his evidence. The declaration filed mentions only one sample, in connection with which the plaintiff charges the deceit

upon which his action is based. This charge of deceit was sufficiently made out, by proof showing that there were in fact two samples, one submitted at the time the contract was entered into, and on the faith of which it was executed, and the second sample following later and presented to plaintiff's president after the shipment called for by the contract had been made, which sample the plaintiff's proof tended to show was submitted by the defendant as a "shipping sample" which corresponded substantially with the original sample; and the plaintiffs case as made out by his proof, and, in our opinion, sufficiently supported by the declaration, was to the effect that the defendant assured the plaintiff that the materials shipped were up to the shipping samples submitted, on the faith of which the plaintiff paid his money.

The defendant further complains of the conduct of the attorney for the plaintiff in the course of the trial. The only argument made on this point, in the defendant's brief, states that the plaintiff's attorney "rushed in and testified for his client," and that while certain exhibits were being placed before the jury during the trial, counsel for the plaintiff "talked to the jury about the exhibits, over the objections of defendant's counsel." Nothing is said in the brief further than this, either concerning the testimony given by counsel for the plaintiff or concerning his alleged remarks to the jury, but the matter is dropped, with the statement in the brief submitted in behalf of the defendant, "We submit this point without further discussion." Under rule 19 of this court, we will not consider points not argued. It is a well established rule that this court will not make

a search of the record, in an effort to find support for points submitted without discussion. Nothing is stated in the argument referred to, as to what the remarks of plaintiff's counsel were and why they were objectionable.

Complaint is made as to certain instructions. The defendant tendered an instruction which the court modified and then gave to the jury as thus modified. The instruction as given read as follows,- the modification by the court consisting of the addition of the phrase appearing in italics - "You are instructed that if the merchandise shipped was tannery hair waste as it is known in the fertilizer business, and substantially as provided in the contract, then the plaintiff cannot recover, and your verdict should be for the defendant." It is argued that by adding the words appearing in italics the court told the jury, in substance, that if the defendant committed a breach of contract he was liable in an action of fraud and deceit. This is not correct. What the court told the jury by this instruction, was the exact reverse of that, namely, that if the defendant had complied with the contract, then he could not be liable for fraud and deceit, which is both correct and in accord with the defendant's contentions. Complaint is also made of the refusal of the trial courtto give an instruction submitted in behalf of the defendant, by which it was sought to tell the jury that in order for the plaintiff to recover it must prove certain specified things by a preponderance of the evidence. Among the instructions given was one worded a little differently, but on the same subject as the refused instruction referred

to, and containing all the elements necessary to be proven by the plaintiff before there could be a recovery, and therefore, the defendant is not in position to complain about the refusal of the additional instruction. With regard to instructions, the defendant further complains of the refusal of the court to instruct the jury, at his request, "that a verdict of not guilty in the case at bar would not prevent the plaintiff from suing the defendant for breach of contract or for money had and received." That instruction had nothing to do with the issue submitted to the jury, as to whether the defendant had been guilty of fraud and deceit, as charged, and the court properly refused it.

The defendant further contends that the verdict for plaintiff is against the manifest weight of the evidence. In arguing this point the statement is made that the defendant tried to keep out of the case, the refusal of the cars shipped by the defendant in fulfillment of this contract, by those to whom the cars had been re-sold by the plaintiff, but in this the defendant did not succeed. An examination of the abstract, at points in the testimony at which the re-sale of these cars was mentioned, discloses no objection interposed to this testimony. The questions at issue in this case were the subject of conflicting testimony. There is sufficient evidence in the record to support the plaintiff's case, if believed by the jury, as it apparently was, in view of the verdict rendered. No reason appears from the record why such evidence should not have been believed by the jury, beyond the fact that there was other evidence to the contrary. The jury saw the witnesses and heard them testify, and in our

opinion, their conclusion may not be said to be against the manifest weight of the evidence.

For the reasons stated, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

298 - 28956

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| IDEAL TOOL & MANUFACTURING CO., a corp., Appellee, v. J. W. WADSWORTH STAFF, Appellant. | 236 I.A. 633 APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

Opinion filed December 24, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of the fourth class in the Municipal Court of Chicago, brought by the plaintiff Company against the defendant Staff, on a trade acceptance, in the sum of $662.16. The trade acceptance was drawn by the plaintiff on the defendant and accepted by the defendant on May 4, 1922, and was payable August 2, 1922. It recited that the obligation of the acceptor thereof arose out of the purchase of goods from the drawer. At the conclusion of the evidence, the trial court instructed the jury to find the issues for the plaintiff. A verdict was returned accordingly and judgment was entered against the defendant, for $664.61. To reverse that judgment the defendant has perfected this appeal.

It is the defendant's contention that the trial court erred in giving the jury the peremptory instruction in behalf of theplaintiff, in view of the fact that evidence had been introduced in the defendant's behalf, tending to prove that the articles manufactured by the plaintiff for

the defendant, and which were covered by the trade acceptance, were defective and useless to the defendant and his customers, and that therefore there had been a failure of consideration, and that evidence to this effect being in the record, the issues should have been submitted to the jury.

The plaintiff Company was a manufacturer of tools. The defendant was a dealer in, and distributor of, automotive equipment including tools of various kinds. The defendant maintained an office in Chicago, and apparently he personally traveled over the country making sales and sending in his orders to the Chicago office to be filled. On May 21, 1921, the defendant gave a written order to the plaintiff for about nine thousand reamers, of specified sizes. Under the terms of the order, about 900 of the reamers were to be delivered at once and the balance as specified. Deliveries did not begin until August and they were made in varying quantities from that time on. There is some controversy in the record as to whether the plaintiff had represented that it was fully equipped to take care of this order and as to whether it was in fact so equipped but in our opinion that is not material. The deliveries as made from time to time, from August on, were accepted, by the defendant and payments were made at different times, aggregating something over three thousand dollars. The record contains several communications between the parties, those from the defendant urging delivery and those from the plaintiff urging payment for past due accounts for goods delivered. On May 4, 1922, the defendant sent the plaintiff the trade acceptance here sued upon. When this trade acceptance was received by the plaintiff, there was received with it, from the defendant, a statement of account of the plaintiff with the defendant, under

the defendant, and which were received by the trade accordingly, very defective and useless to the defendant and his customers, and that therefore there had been a failure of consideration, and that evidence to this effect being in the record, the issues should have been submitted to the jury.

The plaintiff thereby was a manufacturer of tools, and the defendant was a dealer in, and distributor of, automotive equipment including tools of various kinds. The defendant maintained an office in Chicago, and occasionally he personally travelled over the country making sales and sending in his orders to the Chicago office to be filled. On May 23, 1921, the defendant gave a written order to the plaintiff for certain tools to be delivered remote, at specified times. Under the terms of the order, about 80% of the tools were to be delivered at once and the balance on receipt. Delivery did not take place until longer than they were wont to receive goods from the plaintiff. There is some uncertainty as to the reason as to why the plaintiff had remonstrated, but it was fairly evident to both sides of this suit that as to certain items in the order equipment was in our opinion that is not material. The defendant in made this plea that it had, then cancelled it, and accordingly the defendant and plaintiff were well at difference. Upon equipment something were discrepancies delivered. The record contains several letters between counsel on pending. Then the defendant wrote letters and some five the plaintiff requests for paid the accounts for goods delivered. On May 4, 1921, the defendant sent the plaintiff the trade acceptance that used upon. Upon this trade acceptance was received by the plaintiff, then was signed by it. Then the defendant, a statement of account of the plaintiff was for statement, sent

date of May 4, 1922, - the same date as that of the trade acceptance. This statement covered invoices from January 3, to and including April 13,- eleven in number - agregating in amount $662.16, the amount of the trade acceptance. The defendant while on the witness stand did not deny that this statement was sent from his office to the plaintiff, together with the trade acceptance, but he merely stated that he did not know anything about it, these matters being attended to by his office force. It is quite apparent that the trade acceptance was given by the defendant in payment of the reamers covered by the eleven invoices specified in the statement which accompanied the trade acceptance.

In support of his contention that the reamers manufactured for him by the plaintiff were defective, the defendant testified that the first delivery was made in August, 1921, and continued from that time on. He first said that he noticed the defects in thebeginning of 1922,-in January or February. He later testified that he noticed defects in them in August 1921. He then testified that in May or June, 1922, he knew that all these reamers were defective and he made up his mind that he would not pay for them. He had given the trade acceptance sued upon, in payment of the reamers covered by the invoices included in the statement of even date with the trade acceptance, early in May, and there is in the record a letter from the defendant to the plaintiff, the defendant writing from New York under date of June 25, replying to a letter from the plaintiff to the defendant, written three days previous, calling attention to the fact that there was then a balance of over $1300.00 due for goods that had been delivered, and in this letter of June25, the defendant acknowledges receipt of the letter

ness of May 4, 1922; - the same date as that of the trade acceptance. This statement covered invoices from January 3, to and including April 13,- eleven in number - aggregating in amount $[illegible]. The amount of the trade acceptance. The defendant while on the witness stand did not deny that this statement was sent from his office to the plaintiff, together with the trade acceptance, but he merely stated that he did not know anything about it, these matters being attended to by his office force. It is quite apparent that the trade acceptance was given by the defendant in payment of the amounts covered by the eleven invoices specified in the statement which accompanied the trade acceptance.

In support of his contention that the receipts manufactured for him by the plaintiff were defective, the defendant testified that the first delivery was made in August, 1921, and continued from that time on. He first said that he noticed the defects in the beginning of 1922,-in January or February. He later testified that he noticed defects in them in August 1921. He then testified that in May or June, 1922, he knew that all these receipts were defective and he made up his mind that he would not pay for them. He had been the trade acceptance sent upon, in payment of the receipts secured by the invoices included in the statement in question, early in May, and that it is the same trade-acceptance, early in May, that is in the present action. Later from the testimony of the plaintiff, the defendant will-ing from the 1st month [illegible] the receipts in a letter from the plaintiff to the defendant, matters that were prevent selling effectively to the last that year was down a balance of over $[illegible] in the years that had been delivered, and in the letter of [illegible], the defendant acknowledges receipt of the letter

from the plaintiff and says, "Relative to your account, owing to my jumping around so fast, I have been unable to keep in touch with office, however I expect here a statement showing how things are going & will advise office to do what they can for you if they have money. However I hope to be in Chicago on the 10th & at that time will see regarding making you a substantial payment." It is difficult to understand how the defendant could have written the plaintiff as he did late in June, if, as he testified, in May or June he knew "that all these reamers were defective and made up my mind that I wouldn't pay for them." He testified also that reamers were returned every day from the beginning of their transaction; that in October he found defects in the tools returned; that in December when he examined the returned reamers he found the same thing,- rough finish, bad workmanship, cracked and twisted blades and so on. Apparently there was a box of returned reamers in court upon the trial of this case. Some of these reamers were shown the witness and he said they were defective reamers returned by his customers and that they were reamers made by the plaintiff under the order in question. He was asked whether any of the reamers returned were covered by the invoices included in the statement, in payment of which this trade acceptance had been given, and he said he did not know. He also stated that he did not know when the reamers, which he claimed were defective and had been returned to him by the customers, were delivered, nor to whom they had been delivered, nor what customer had returned them, nor how they had been handled while in the possession of the customer. The defendant

explained that his business took him away from Chicago for weeks at a time and that he was only in Chicago occasionally and then just for a few days, but he testified that he was advised, from time to time, by his employees in Chicago, that the plaintiff's reamers were defective and were being returned; and he testified that this matter was called to the attention of the plaintiff and that the latter promised to repair the reamers returned and correct defects in future shipments, and that on the faith of these assurances he made payments from time to time.

One Forngren, a tool maker, was shown certain reamers which had been returned to the defendant by the customers. He was also shown a sample reamer such as the defendant claimed he had exhibited to the plaintiff at the time this order was given, the defendant's contention being that the reamers covered by the order were to be made according to this sample, and the witness testified as to certain differences between this sample and the returned reamers which were shown to him on the witness stand. On cross-examination this witness testified that use would have some effect on reamers, but that use would not effect some of the differences between the sample and the reamers exhibited to him, about which he testified.

In our opinion, the trial court was justified in giving the peremptory instruction for the plaintiff, because, taking the defendant's testimony most favorably for him, he failed entirely to show that any of the reamers claimed to be defective, were those covered by the invoices, in payment of

which he gave the trade acceptance, and, in our opinion, he also failed to introduce any evidence showing or tending to show that the reamers manufactured by the plaintiff, for the defendant under this order, were materially defective or materially different from the sample shown the plaintiff by the defendant (assuming that the plaintiff had undertaken and agreed to manufacture according to the sample) at the time they were delivered. The defendant made no showing whatever as to the condition of the reamers at the time of delivery, nor did it make any showing to the effect that they were defective at that time. It was admitted that the reamers produced in court had been in the hands of defendant's customers, in various parts of the country, but that it could not be stated how long they had been in the hands of these customers, nor whether during that time they had been subjected to ordinary and proper use or not.

Such being the state of the evidence, we are of the opinion that the defendant failed to establish a proper defense against the plaintiff's claim on the trade acceptance, and the court was, therefore, warranted in giving the instruction complained of.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

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| HENRY W. POLLOCK, Trustee in Bankruptcy of the Estate of the Borenco Importing Corporation, a Bankrupt Corporation, Appellee, v. MIDLAND HAT COMPANY, a corporation, Appellant. | 236 I.A. 633 APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

Opinion filed December 24,1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $1400.00, recovered against it by the plaintiff in the Municipal Court of Chicago. It appears from the statement of claim filed by the plaintiff that early in the fall of 1919, the parties entered into a contract for the sale, from the bankrupt to the defendant, of a lot of straw hat goods known as China piping, including fifteen cases of China piping No. 1, in sizes from 6 to 6½ millimeters, at 50 cents per piece, f.o.b. New York; delivery "about January - February, 1920." The contract provided further; "Goods to be as sample submitted, with usual variations," and also that it was contingent upon certain specified conditions, "and all other contingencies unavoidable or beyond our control." It was alleged in the statement of claim, as to the fifteen cases of China piping in controversy, that on February 26, 1920, the plaintiff delivered 10 cases, forwhich the contract price was $2400.00,

and that the balance of 5 cases was delivered to the defendant on March 30, 1920, for which the contract price was $1200.00, but that the defendant refused to accept and pay for the piping, as so delivered; that the market price of piping of the type involved, in New York City on February 26, was thirty cents per piece, and that it was the same on March 30; and it was further alleged that by reason of the refusal of the defendant to accept and pay for the piping delivered, as alleged, the plaintiff had suffered the damages sued for. By its amended affidavit of merits, as amended, the defendant admitted that it had contracted with the bankrupt, as set forth in the statement of claim, but denied that pursuant to this contract or in compliance with its terms, the plaintiff had delivered 10 cases of piping to the defendant on February 26, as alleged. The defendant then proceeded to allege that on or about March 27, the plaintiff caused 15 cases of piping to be shipped to the R. H. Comey Co. of Chicago, which piping varied in size from 6½ to 7½ millimeters. The defendant further alleged that by reason of the plaintiff's delay in shipping this piping, and by reason of plaintiff's neglect to tender for delivery 15 cases of piping of the sizes stipulated in the contract, namely, 6 to 6½ millimeters, the defendant declined to receive the piping tendered for delivery, or pay for the same according to the terms of the contract. The defendant further alleged, in its affidavit of merits, as amended, that the market price of piping, in fifteen case lots, of the sizes of 6 to 6½ millimeters, in the City of Chicago and in New York, during the months of January, February and March,

1920, was not less than fifty cents per piece, the contract price, wherefor the plaintiff had sustained no damage because of the defendant's refusal to accept the piping tendered.

One of the defenses interposed by the defendant, was to the effect that the piping included in the shipment of the 15 cases, was not in accordance with the terms of the contract, in that it was not within the sizes specified in the contract. The defendant offered testimony to the effect that the chief clerk of the Comey Company, to which company the cases were consigned, inspected the piping contained in these cases and ascertained that the width of the piping shipped was 6½ to 7 millimeters, but objections interposed by the plaintiff, to this line of proof, were sustained by the court on the theory that the defendant had declined to receive the piping contained in these 15 cases, solely on the ground that the delivery was too late and that this action on the part of the defendant constituted a waiver of it of any other grounds, for its action in refusing to accept delivery. The defendant contends that the action of the trial court, in thus sustaining plaintiff's objections to this proof, constituted error. In our opinion it is unnecessary to pass on this question, because even if we assume that the defendant was in a position to make a defense on the question of a variation in size of the piping, and that the testimony offered in behalf of the defendant on this question was competent, we are of the opinion that it was nevertheless immaterial, and therefore the defendant was not prejudiced by the court's ruling in sustaining the

objections to it. The contract called for China piping No. 1, "6/6½ m/m." and provided that goods were to conform to sample submitted, "with usual variations." Testimony was submitted in behalf of the plaintiff, to the effect that "the usual variations in the strands, made by hand, after being braided up, is about a half a millimeter, sometimes a whole millimeter. It all depends on the thickness of the straw, the thickness as the straw grows. M/m means millimeter and 6/6½ means that the braid measures between, or approximately from six millimeters to six and one-half millimeters." This evidence was uncontradicted,- indeed, counsel for the defendant in his brief filed in this court, admits that the statement that a one-half millimeter is allowed for variation in size, is true. Therefore, even if it be assumed that the piping contained in the 15 cases tendered the defendant under this contract, when measured was found to be of widths from 6½ to 7 millimeters, it would be quite immaterial and furnish no reason which would justify a refusal of the delivery, for piping of such widths was entirely within the requirements of the contract, in view of the fact that the "usual variations" amounted to one-half a millimeter.

The defendant seeks to avoid liability on the further ground that the plaintiff shipped the goods in question too late to come within the requirements of the contract. The proof shows that ten cases were shipped from New York, by the plaintiff under this contract, on or about February 26, and a bill of lading was issued by the railroad under that date. The president of the bankrupt company testified that he mailed this bill of lading to the president of the defend-

ant company. In this connection, the witness was shown a carbon copy of a letter dated March 21, 1920, from the bankrupt company to the defendant, and he testified that the bill of lading just referred to was mailed to the defendant together with the original of that letter. Why the plaintiff did not forward this bill of lading, issued on February 26, until March 21, does not appear. The evidence as to the shipment of the remaining five cases is to the effect that the bankrupt company turned them over to a truckman on March 20, and the railroad issued its bill of lading for this shipment, on March 23. The bankrupt company wrote the defendant, under date of March 20, enclosing invoices for the fifteen cases. Under date of March 27, the president of the defendant company wrote the bankrupt company that upon his return to the city he had found these invoices awaiting him, and he was returning them therewith, saying, "You have shipped this braid entirely too late for us and it is absolutely out of the question for us to use the same. Had you shipped on time, we not only could have used this braid but you would have saved us considerable money, as we had to go on the market and purchase." The president of the bankrupt company wrote the defendant in reply, under date of March 31, urging acceptance. The evidence is somewhat confusing, as this letter of March 31 states that the writer is enclosing the railroad bill of lading for the ten cases shipped on February 26, although the witness who wrote that letter had previously testified that this bill of lading had been sent to the president of the defendant company in a letter dated March 21. Again, the defendant, in a letter dated April 5, acknowledging receipt

of the letter of March 31, from the bankrupt company, declined the "shipment of March 20. These are absolutely too late for us to use. It seems rather peculiar that these goods were shipped to us on February 26, and invoiced to us on March 20. We positively could not use these. We would have only been too glad to have them if you had shipped on time."

It appears from the record that the shipment of February 21, was received in Chicago by the Comey Company on March 11. The defendant contended that the Comey Company was the agent of the bankrupt company and counsel for the defendant, in the course of the trial, offered to prove that after the execution of the contract, the president of the defendant company, while in New York, had a conversation with one Schiller, in which Schiller advised him that the Comey Company was the warehouse agent of the bankrupt company, in Chicago, and that shipments under this contract would be made by the bankrupt company to the Comey Company, and the defendant should deal with the latter with respect to thesubject-matter of the contract, it being the contention that the effect of this conversation between the parties designated, was to change the delivery terms of the contract from f.o.b. New York to delivery in Chicago. Counsel for the plaintiff proceeded to state his objections to this offer of proof, but was interrupted by a remark made by the trial judge, and later on, in stating his objections, counsel contended that the evidence involved in the offer was objected to as incompetent, irrelevant and immaterial, "and as not bearing on the case whatsoever." The objection was sustained.

In our opinion, this ruling cannot be considered as error. The offer made contained no statement as to who Schiller was, nor any offer of proof as to his authority to bind the plaintiff, and furthermore, the proof thus offered was not within the pleadings for the defendant had not made any point of a change in the contract between the parties, but in the amended affidavit of merits the defendant had admitted that he had entered into a sales contract with the plaintiff, "in words and figures set forth in the plaintiff's statement of claim." The record contains a letter from the defendant to the bankrupt company, under date of February 14, reading as follows: "There are due us from you an early contract fifteen bales of piping braid. Will you kindly advise by return mail about when we can expect deliveries on these? Should they be ready to ship at once, please forward by freight to R. H. Comey Co., Chicago." So far as the record shows, the defendant thus made the Comey Company its agent and directed the f.o.b. New York delivery, under this contract, to be made to that agent. The record further shows that of the fifteen cases involved, ten cases were shipped to the Comey Company, twelve days later, on February 26, and the balance of five cases was shipped in the same manner under date of March 23. In charging the jury the trial court referred to the issue raised by the defendant's contention that the fifteen cases involved had not been shipped within the time specified in the contract, and stated that there could be no question as to the ten cases shipped on February 26, as the contract called for delivery f.o.b. New York, and the proof showed without contradiction that these ten cases were

In any judgment, this ruling cannot be considered as error. The offer made contained no statement as to who said it or when, nor any offer of proof as to his authority to bind the plaintiff, and further more, the proof then offered was not within the pleadings for the defendant had not claimed by plea of a change in the contract between the parties, but in the amended affidavit of merits the defendant had admitted that he had entered into a sales contract with the plaintiff, "in words and figures set forth in the plaintiff's statement of claim." The record contains a letter from the defendant to the Hartford Company, under date of February 16, reading as follows: "There are due us from you on duly executed invoices bills of lading small. Will you kindly advise by return mail above when we can expect delivery so that we should they be ready to ship at once, please forward freight to R. M. Coney Co., Chicago." Letter of February 16 shows, the defendant then made the Coney Company its agent and directed the f.o.b. due Tech delivery, made this contract, to be made to that agent. The record further shows that of the fifteen cars involved, ten cars were shipped to the Coney Company, twelve days later, on February 28, and the balance of five cars was shipped in the same manner under date of March 22. -- changing the jury the total amount was reduced to the issue raised by the defendant's contention that the fifteen cars involved had not been shipped within the time specified in the contract, and stated that there could be no question as to the cars shipped on February 28, as the contract called for delivery f.o.b. Ken Tech, and the plaintiff's correspondence [illegible]

delivered to the railroad in New York, by the plaintiff, on February 26, which was within one of the two months specified in the contract. The question of whether or not the shipment of the remaining five cases, which were delivered to the railroad at New York on March 23, was within the terms of the contract, was left for the jury to determine, as a question of fact, the court pointing out that the contract called for delivery "about January - February, 1920," and instructing the jury that such a provision called for delivery within the two months named, or a reasonable time before or after those months. No objection was raised by counsel for the defendant to that portion of the court's charge to the jury. This court is not in a position to say that the conclusion of the jury, to the effect that the plaintiff had made deliveries at times which were within the requirements of the contract, was not warranted by the evidence. There was considerable evidence before the jury, submitted in behalf of the plaintiff, to the effect that owing to adverse weather conditions, caused by heavy snow storms in New York City in February and March, 1920, imports which had to pass through the Custom House in the City during that period, piled up in large quantities and considerable delay was occasioned by reason of this, in getting the last five cases involved in this contract, through the Custom House. The plaintiff also offered evidence tending to show that during this period there was great congestion on the railroads affecting shipments for New York as well as from the Atlantic seaboard to the west, as a result of which considerable delay was experienced

in the shipment of non-essentials. The defendant submitted testimony tending to contradict both the claim that there were delays in getting goods through the Custom House, during this period, and also the claim that there was a railroad embargo as to the shipment of non-essentials. This conflicting testimony was for the jury to consider and pass upon.

Counsel for defendant argues that the jury in this case could not return a verdict for the plaintiff "without acting unreasonably in the eye of the law," without proper proof of the sample submitted at the time the contract was entered into, and showing that the goods were like the sample. In our opinion, this contention is untenable. The contract called for 15 cases, China piping, No. 1. 6/6½ m/m, and provided that the goods were to be "as sample submitted, with usual variations." No contention is made that the goods shipped were not of the right quality, but the only objection raised is as to their size. The sample could not control the size of the piping to be shipped under this contract, which was from 6 to 6½ millimeters, except that the contract provided that the goods shipped might be within the usual variations, which, as above stated, was shown to be "about a half a millimeter, sometimes a whole millimeter," depending on the thickness of the straw.

As we understand the defendant's contention on the question of damages, it is that the verdict of the jury, awarding the plaintiff damages representing the difference between the contract price and the market price at the dates

of deliveries made under this contract, is against the manifest weight of the evidence. It is pointed out that while the witness for the plaintiff testified that the market price of this piping in New York, in January, 1920, was eighty-five cents, and during February it fell off, until about the end of February it was thirty cents per piece, which was the prevailing price between February 26 and March 24, and on into April, three witnesses for the defendant testified tothe effect that the price in January was as high as eighty-five cents, but that during February and March it did not fall below fifty cents. If the price did not fall below fifty cents during the months referred to, the plaintiff could not be considered as having suffered any damage, even if the defendant wrongfully refused to accept delivery of this piping, as that was the contract price. The jury passed upon this conflicting testimony, and, in our opinion, the record is not such as to warrant this court in holding that the verdict was against the manifest weight of the evidence, on that point.

The defendant points out that if the deliveries which were made by the bankrupt company, are to be considered as deliveries f.o.b. New York, as called for by the contract, the right of action against the defendant would be for the contract price, the defendant having refused to receive the goods after they reached Comey & Co., in Chicago, and not for the difference between the contract price and the market price, which was the basis of the plaintiff's action. If the defendant declined to have anything to do with these shipments of piping, after they had reached Chicago from New York, and

were in the possession of Comey & Co., assuming the latter to be acting as the defendant's agent, the shipper would have the right to resume possession of the goods involved, sell them on the market, and bring suit against the defendant for the difference between the contract price and the market price at the time and placeof delivery. That is what the shipper did in this case.

The defendant complains of the conduct of the trial court during the course of the trial, contending that the court showed the defendant's counsel such a lack of consideration, and exhibited such a degree of impatience, as to prejudice the defense in the eyes of the jury. We have given this matter careful consideration, but in our opinion the record does not disclose any such course of conduct on the part of the trial judge as could reasonably be said to have had any such effect as counsel contends it had.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

335 - 28993

EMMA CARTER,

Appellee,

v.

ADDISON BLAKELY,

Appellant.

236 I.A. 633

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed December 24,1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was a forcible entry and detainer proceeding brought by the plaintiff Carter against the defendant Blakely, in which the plaintiff sought to recover possession of the apartment occupied by the defendant in an apartment building of which the plaintiff was the owner. By this appeal the defendant seeks to reverse a judgment for possession, entered in the Municipal Court of Chicago, in favor of the plaintiff, based upon an instructed verdict given at the close of the evidence.

When this suit was started, and the defendant was served with summons, he first filed a special appearance which was in the nature of a plea in abatement, by which he pointed out that an ejectment suit covering the same premises, and brought brought against this defendant by the same plaintiff, was pending in the Circuit Court of Cook County, and the contention was made that because of this the Municipal Court was without jurisdiction in the case at bar. The defendant urges the same matter in this court. However, he waived any point he might have had in that connection, by later filing a gen-

Opinion filed December 24,1964.

eral appearance and jury demand in the Municipal Court in this case, and going to trial on the merits on the sole question of the date of the termination of the tenancy and the sufficiency of the notice.

The complaint in the case at bar was filed on October 18, 1922. Over the objection of the defendant, counsel for the plaintiff read to the jury a portion of an affidavit, which had been filed by the defendant in the case at bar, entitled, "Affidavit in Support of Motion in Abatement" in which the defendant set forth that he had leased the apartment in question on October 1, 1913, for a period of one year, and that at the end of that time he held over and continued to pay his rent and thus acquired a year to year lease, under which he was still in possession of the premises. The plaintiff then introduced in evidence a sixty day notice of the termination of defendant's tenancy, dated July 26, 1922, signed by the plaintiff and directed to the defendant at the address of the premises in question, in which the defendant was notified that the plaintiff had elected to terminate the tenancy to the apartment occupied by the defendant, and further, the defendant was notified to quit and deliver up possession of said premises "at the end of the present yearly term, expiring September 30, 1922." Service of this notice on the defendant was admitted, as was the ownership of the property in the plaintiff. Having made this proof, the plaintiff rested.

The defendant then introduced certain of the documents involved in the ejectment suit pending in the Circuit

Court of Cook County between these parties, and among them a notice sent to the defendant by James S. Carter, the husband of the plaintiff, (since deceased) dated February 1, 1921, demanding immediate possession of the apartment in question, together with proof of the service of the notice on the defendant on the date it was dated, and also written authority from the said James S. Carter to his counsel to institute suit "in any court of record by ejectment process or any other legal form of suit which may be practical * * * to recover possession" of the premises in question; and also the declaration in the ejectment suit, in which the plaintiff complained that "on or about February 1, 1919, said defendants entered upon and into the first apartment in the said described apartment building * * * and said defendants still occupy said premises, denying the plaintiff possession thereof, therefore he brings suit, etc." Defendant also offered in evidence receipt dated February 1, 1922, signed by the plaintiff's agent, covering the rent down to and including the month of February 1922, and also further checks showing payment of the rent down to and including the month of August 1922. Counsel for the defendant then tendered counsel for the plaintiff a certified check for the rent, to and including the month of January, 1923. The trial of this case was had on February 2, 1923. The tender referred to was refused and the defendant then rested. The court then instructed the jury that the plaintiff was entitled to recover possession of the premises, and the jury was directed to find the defendant guilty. The appropriate verdict was accordingly returned by the jury following which the judgment from which this

appeal has been perfected, was entered.

There has been a great deal of litigation between these parties over the possession of the apartment occupied by the defendant. The nature of his tenancy was passed upon by this court in the case of Pangborn v. Blakely, 217 Ill. App. 67. In that case Pangborn had brought an action in forcible entry and detainer against this defendant, the plaintiff suing as lessee from the owner Carter, and it was there pointed out that the defendant was in possession of the premises as a tenant from year to year, the lease being by oral agreement commencing the first term on October 1, 1913, and ending September 30, 1914. In that case an attempt was made to secure possession of the premises by virtue of the service of a sixty day notice to surrender possession March 1, 1919, and it was held that the notice was not effectual because at the time the action was brought the defendant was in possession under a term which would not expire until September 30, 1919, and therefore, his tenancy could not be terminated unless by a sixty day notice served at some time within the first four months of the last hald year of the then existing term. Cahill's Ill. Rev. Sts. ch. 80, sec. 5. The sixty day notice admitted by the defendant to have been served upon him in the case at bar was such a notice and operated to bring the defendant's right to possession of the premises to a close on September 30, 1922, and gave the plaintiff right to possession of the premises thereafter. The contention of the defendant to the effect that, by reason of the documents involved in the action in ejectment in the Circuit Court which were

introduced in evidence in the case at bar, and the statements therein contained, the plaintiff had changed the time of the expiration of the defendant's year to year tenancy, from September 30, to January 31, is, in our opinion, entirely untenable. The evidence showed that within a week after the case at bar was begun by the plaintiff, the defendant had stated in writing and under oath, in the affidavit submitted by him in support of his motion in the nature of a plea in abatement, that he was "still in possession", under a "year to year lease" which he had acquired by "holding over and continuing to pay rent" after the expiration of his original lease which was entered into "Oct. 1, 1913, at $390.00 for one year". On the defendant's own theory and contention as to the facts affecting his possession, the notice was within the requirements of the statute. Even if it be considered that the documents filed by the plaintiff in the Circuit Court tended to show that his position was that defendant's tenancy expired January 31, (which we consider unwarranted) defendant demonstrates by his own affidavit filed in the case at bar that he had never agreed to any such change and that the fact was no such change had been made. On the evidence before the court when the case was closed, the peremptory instruction complained of, was proper.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

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| C. SALOPOULOS, Doing business as GREEK SALONIK, Appellee, v. SELL BROTHERS COMPANY, a corp., Appellant. | 236 I.A. 633 APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

Opinion filed December 24, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Company seeks to reverse a judgment for $267.00 recovered in the Municipal Court of Chicago, by the plaintiff, in an action of the fourth class, in which the plaintiff claimed a balance due from defendant on a contract for advertising. The defendant was engaged in the tailoring business and the plaintiff was the proprietor of a Greek newspaper.

By his statement of claim the plaintiff alleged that his claim was founded upon a written contract, copy of which was attached to the statement of claim. This contract was signed by one Wetzel, vice-president and general manager of the defendant company and by one Laskus for the plaintiff. By this contract the defendant authorized the plaintiff to publish in his newspaper one thousand inches of advertising, "every week for one year, consecutive months, for which we agree to pay you the sum of $500.00 for said period, payable monthly." The plaintiff further alleged in his statement of claim that he had performed his part of the

contract and had published the defendant's advertisements from March 19, 1921, to August 6, 1921, when he was advised by the defendant to discontinue advertising until further notice; that the plaintiff did as thus requested, and that on March 25, 1922, he "was instructed to and did run insertions in accordance with contract up to September 16, 1922." The contract between the parties was dated March 11, 1921.

By its affidavit of merits the defendant admitted entering into the contract in question and that the plaintiff had published its advertisements under that contract, from March 19, 1921, to August 6, 1921, and that on the latter date "defendant instructed plaintiff to discontinue publishing the advertisements. The plaintiff agreed to and did discontinue and thereupon abandoned the contract." By its affidavit of merits the defendant denied that on March 25, 1922, "it instructed plaintiff to run further insertions of defendant's advertisements in plaintiff's newspaper." The issues thus formed were submitted to the court without a jury.

In support of its appeal the defendant contends that where one sued upon a written contract, he must make out his case, if at all, under such contract, and cannot recover on proof of an oral contract, and also that a contract once abandoned by mutual consent cannot be revived by one of the parties and enforced against the other without the consent of the latter. These are sound legal propositions, but, in our opinion, under the evidence in

the record, they are not applicable to the situation presented here. The plaintiff is suing on a written contract, the time for performance of which was extended by parol agreement. The defendant also contends that the finding of the trial court is against the preponderance of the evidence. This court may not disturb the finding of the trial court, on the disputed facts in evidence, unless, in our opinion, that finding may be said to be against the manifest weight of the evidence.

Laskus, who signed the contract in behalf of the plaintiff, testified that he was the advertising solicitor for the plaintiff's paper; that after the contract in question was entered into, he always got the copy from one Tauk, for the defendant's advertisements; that these advertisements were run for two months and then stopped and then run for three months and then stopped again; that these orders were given by Tauk; that after the contract was entered into, the advertisements were run for a total of six months; that the witness saw Tauk every week or two and at the end of the six months Tauk told the witness that he would like to stop all advertisements with all advertisers, as "business is a little slow;" that the advertising was stopped and after that the witness saw Tauk a number of times, sometimes every week or two and on such occasions he asked Tauk if he was going to run the advertisements, and he said if business picked up he was going to run them; that he had a talk with Tauk in March 1922, and upon being asked what that conversation was he answered, "to run and finish the ad. * * * Start this week," and that he told him where to get the copy and that he, the

they are

witness, did get the copy and run it; that the advertising was then run for six months, the copy being changed by Tauk eight or ten times; that on one or two occasions during this period Tauk directed the witness not to run the advertising during that week, but to put it in the following week; that a total of $233.00 had been paid the plaintiff by the defendant for this advertising and the balance of $367.00 had never been paid; that on one occasion the witness had talked with the defendant's vice president Wetzel, who signed the contract, and asked him for some of the money due, and Wetzel asked the witness who gave him the order, and he told him that Tauk had given the order, whereupon, Wetzel said, "I will fix you up some other time," - that this was three to five weeks after the advertising had been completed.

For the defendant, Wetzel testified that he had agreed to the terms of the contract and signed it; that Tauk did not have authority to place advertising for the defendant; that he was employed merely to writ copy; that in August 1931, the witness talked with Laskus and told him to discontinue the advertising in theplaintiff's newspaper, and that Laskus said "all right;" that nothing was said later about running the advertising again. The witness was asked whether he had any conversation with Laskus subsequently, in regard to further advertisements, and he answered, "He came in and I told him, nothing doing."

We have here one witness for each party with the testimony in some respects flatly contradictory. It may not be said in such a situation that the plaintiff has failed to prove his case by a preponderance of the evidence. First

witnesses, did not deny that they had lied, that the advertising was then one far ahead, the copy being changed by Mark Allen at the time, that he was at the Hollywood Hotel, that Harold Stern directed the witnesses not to use the advertising during that week, but to pay it in the following week, and a total of $900.00 had been paid the plaintiff by the defendant for this advertising and the balance of $900.00 had never been paid, that on the occasion the witness had talked with the defendant's vice president Werner, who signed the agreement, and asked him for some of the money due, and Werner asked the witness who gave him the order, and he told him that Mark had given the order, whereupon, Werner said, "I will fix you up some other time." - This this was three to five weeks after the advertising had been completed.

For the defendant, Harold Fredericks testified that he was signed to the terms of the contract and claimed that that did not have authority to place advertising for the defendant; that he was unlikely to make money for the defendant in August 1953, the witness talked with Jennie and told her to discontinue the advertising in Universality's newspaper, and that Jennie said that it might "Kill" the defendant and that Jennie said that Mark Allen was the person who was responsible for the advertising. Mr. Fredericks said that Mark Allen was the person who was authorized to place the advertising. Mr. Fredericks testified that he was in Europe during the advertising period, in Germany, in Switzerland, and in Liechtenstein, "I was on and I did not, nothing after."

The jury found the defendant for the said party with the testimony in some respects fairly contradictory. It may not be said in such a situation that the plaintiff has failed to prove his case by a preponderance of the evidence. Plaintiff

State Bank of Plano v. Isaacs, 221 Ill. App. 658; Sears, Roebuck & Co. v. Sears, Slayton Lumber Co., 226 Ill. App. 287. The testimony of the witness for the plaintiff tended to show that the plaintiff adquiesced in the defendant's request to discontinue the advertising, because of adverse business conditions about the middle of theperiod which the contract purported to cover and that during the remainder of the period, Tauk, who had handled all the advertising, representing the defendant, stated a number of times that he expected to resume the advertising if business picked up; and that finally he directed that the advertising be resumed; that he continued to furnish copy for it for another six months, and that the advertisements were run in accordance with copy furnished by Tauk. We are not in a position to say from the printed record that the trial court was not warranted in believing this testimony, notwithstanding the testimony submitted to the contrary in behalf of the defendant. If the situation was as testified to by the witness for the plaintiff, the latter accommodated the defendant in discontinuing the advertising in the middle of the contract period and it may not be said that the plaintiff attempted to revive the contract and enforce it against the defendant against his consent, but rather in pursuance of the defendant's consent and agreement that this be done.

The defendant also contends that the evidence fails to show that Tauk had any authority to place any advertising for the defendant. In answer to that contention it is sufficient to point out that under the evidence submitted in

behalf of the plaintiff, Tauk did everything there was to be done in connection with all the advertising which the plaintiff ran for the defendant, except to sign the contract. If Tauk had sufficient authority to act on behalf of the defendant, in directing the several discontinuances of advertising that are involved, he had sufficient authority to direct that the advertising be resumed.

In our opinion, there is no error in the record and the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

369 - 29027

JOHANN STRAUSS,

Appellee,

v.

STATE COMMERCIAL & SAVINGS BANK, a corp.,

Appellant.

236 I.A. 634

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed December 24, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Bank seeks to reverse a judgment for $2, 301.89, recovered by the plaintiff in the Superior Court of Cook County. By his declaration the plaintiff alleged that on March 23, 1917, he paid the defendant Bank $1,769.38, for the purpose of purchasing a ten thousand mark 5 per cent German War Loan bond, and received a receipt from the defendant Bank acknowledging receipt of that amount, for the purpose designated, and further reciting, "The original securities are to be delivered to the Reichsbankstelle, at Kempten, Allgau, Bayern." He further alleged that the defendant "did not purchase the ten thousand dollar - 5 per cent German War Loan bond for the plaintiff, nor transmit said money of one thousand seven hundred sixty nine dollars and thirty eight cents ($1,769.38) or deliver or direct to be delivered the said War bond" to the bank at Kempten, and that being so indebted the defendant promised to pay the plaintiff the money on request, but although the defendant had

Opinion filed December 24, 1924.

been so requested, the bank had not returned the money but had refused so to do. The defendant filed a plea of the general issue to this declaration, and the issues thus formed were submitted to a jury, resulting in a verdict finding the issues for the plaintiff and assessing his damages at the sum of $2,301.89, being the amount he had paid the Bank, with interest; following which the judgment appealed from was entered.

The evidence shows that on March 23, 1917, the plaintiff paid the defendant $1,759.38, as alleged, at which time the defendant gave the plaintiff an "interim-receipt" for the amount paid, "For mark ten thousand - 5 per cent German War Loan," to be delivered to the bank at Kempten, as already recited. The record contains a number of original letters, together with their translations, from the defendant to its correspondent bank at Berlin, and also a number of letters from the Berlin bank to the defendant. These letters were admitted in evidence under a stipulation, to the effect that they were to be admitted in evidence subject only to objections as to their materiality. Among these letters, was one from the defendant to the Berlin bank dated March 24, 1917, in which the defendant referred its correspondent to its telegram of March 17, and its letter of March 20, and then requested the Berlin bank "to deliver from the remaining Mk.60,800 5% German Government Bonds, Mk. 10,000, for account of ," plaintiff,"to the Reichsbankstelle, Kempten, Bayern, and to send us deposit certificate. The remaining Mk. 50,800, you will kindly keep in our safe-keeping depot until further notice and we shall dispose of them at a later date." Apparently this letter of March 24, 1917, was never received by the Berlin bank. The trial court properly took judicial notice

of the state of war which existed between the United States and Germany during a period beginning about two weeks after the date of this letter. The record contains a letter from the Berlin bank to the defendant under date of May 24, 1917, - this letter coming through a firm in Copenhagen, in which the Berlin bank reported to the defendant concerning the disposition of certain bond orders but not mentioning any bonds for the plaintiff's account. This letter acknowledged receipt of the defendant's letter of March 20, referred to in the defendant's letter to the Berlin bank of March 24, but stated that the defendant's cable of March 17, also referred to in the defendant's letter of March 24, and presumbly in its letter of March 20, had never been received. This letter from the Berlin bank, dated May 24, 1917, made no reference to the defendant's letter of March 24th.

The plaintiff testified that he called at the defendant Bank during the War "and they always said the money was over there;" that he was talking to Mr. Stein of the defendant Bank; that he said, "I couldn't get any encouragement until the war was done and I said, ' I can depend on it' and he said, 'Absolutely, - the bonds is over there,'" The plaintiff further testified that he went over to Germany in 1921, which was after he instituted this suit against the defendant. He testified that he went to the bank at Berlin and also to the bank at Kempten,and he gave considerable testimony as to what was

said to him by various individuals connected with those banks. All testimony of that character was, of course, hearsay but it was admitted over defendant's objection, which was error. The plaintiff further testified that after his return to this country he again went to the defendant Bank, and he was asked whether he made any demands for his money and he replied that he made demands the same as before nd they said, "The bonds is over there but I could have the bonds here." There was some further testimony by the plaintiff to which reference will be made later.

For the defendant, oneMueller, the manager of the defandant's Foreign Exchange Department, in 1917, testified to the plaintiff's visits to the defendant Bank. He also testified to a conversation he had with the plaintiff sometime in 1919, in which he told the plaintiff that his bonds had been ordered but "that we had not received any replies from the bank on account of the mail conditions; that these bonds were deposited in his name and that he would have to wait until the situation had cleared up;" that he had subsequent conversations with the plaintiff, the subject-matter of which was substantially the same.

One Stein was an officer of the defendant Bank in 1917, and in charge of the defendant's Foreign Exchange Department during the absence of Mueller, which the latter testified extended from October, 1917, to February, 1918. Stein testified that he was present at the time the plaintiff made the purchase of bonds involved in this case, and that he told the plaintiff at that time "that the Reichsbank will in-

quire about it, because we have notice that they don't accept any deposits or papers for safe-keeping from individuals; only from banks;" that the plaintiff replied, "My father has an account there but we can try it;" that he then told the plaintiff, "We could not do those things;" that the plaintiff replied, "Well, do it anyhow, and furthermore, it don't make much difference when I get the bonds; I intend to go over to Germany after the War is over, and it don't make much difference whether I get the bonds in Berlin or to get them in Kempten." The plaintiff had previously testified that he had paid his money to the defendant Bank, "that the bank should buy me over there 10,000 marks, 5 per cent War bonds to transfer on the bank in Kempten on account of my father." It appears from thetestimony in the record that the plaintiff's father and brother were in Kempten at that time. With reference to Stein's testimony, the plaintiff testified in rebuttal that on the day he purchased his bonds he transacted his business with Mueller; that the only other man he had anything to do with that day was one Walter Stein, (not the witness above referred to) who signed the receipt which was given the plaintiff on that occasion; that he did not see the other Mr. Stein in the bank and did not talk to him.

Stein further testified that after the war was over, the plaintiff called at the defendant Bank once or twice a month, buying foreign exchange, and that on one occasion he said to the plaintiff; "How about the bonds? Do you want those bonds over here. We can give you some bonds here * * * Your bonds are at the Disconto Gesellschaft (the defendant's correspondent) at Berlin and they are being held by the Custodian

quite about it, because we have notice that they don't accept any deposits or payment for safe-keeping from individuals, only from banks." that the plaintiff replied, "My father has a[illegible] there but - you say by" that he then told the plaintiff, "We could not do those things" that the plaintiff replied, "Well, do it anyhow, and furthermore, it doesn't make much difference when I get the money I intend to go over to Germany after the war is over, and it isn't just that I want to make it for the bank in Berlin in it is yet time to [illegible]ove." The plaintiff was persuasively pleading and he [illegible] his money to the defendants bank. "Look the bank should buy me over there [illegible] marks, I just want to transfer on the bank in Berlin on account of my fathers." It appears from testimony in the record that the plaintiff's father had lived over in Europe at that time. With reference to Bertle's testimony, the plaintiff testified in rebuttal that he the day he purchased his bonds he transferred his business with Bertling that the only other one he had anything to do with was his uncle Julius. [illegible] who signed the receipts which was given the plaintiff on that occasion. May in did not tell the other Mr. Frank in the bank and did not talk to him.

Again further testified that after the war was over, the plaintiff called at the defendant bank came to Tulsa a month, buying foreign exchange, and that in one occasion he said to the plaintiff, "Can about the receipt. He you said these bonds were here. We can sign you back some [illegible] bonds was at the discount department (the defendant's exchange department) at Berlin and they are being held by the Reichsbank

of Alien Property;" that the plaintiff replied, "It makes no difference, I don't need them. I am getting my interest on them and I intend to go over there and it doesn't make much difference to me, and furthermore, I can't do it on account of my lawyers. I paid $250 to my attorneys and they guaranteed me to get the entire amount of money, on account of the low rate of marks now. I don't want them,- of course if I have got to take them I will take them but I want the money now." Stein further testified that the bonds which had been purchased for the plaintiff" are still over there now;" that in 1920 the defendant submitted the plaintiff "some German Bonds." He was asked if they were the bonds here in question andhe replied, "They were not probably the same papers, but they were the same bonds and he would not take them * * * I asked him if he would release the bonds in Germany and leave them over there and we would give him different ones here," but plaintiff refused. While the plaintiff was on the witness stand in rebuttal he admitted that he told Stein, before going over to Germany, that he would ask for the bonds when he went to Germany.

As already stated, the evidence in the record is such as to indicate that the letter which the defendant wrote its Berlin correspondent on March 24, 1917, the day after the plaintiff paid the defendant the money now sued for, in which letter the defendant directed its correspondent to send bonds in the sum of 10,000 marks, of those apparently then held by the Berlin correspondent, subject to the defendant's orders, to the bank at Kempten, for account of the plaintiff, never reached the Berlin correspondent. It would appear from the

record that when the defendant learned of this fact it again ordered its Berlin correspondent to procure these bonds and send them to the bank at Kempten, for plaintiff's account, for among the letters in the record was one from the defendant to its Berlin correspondent, dated October 6, 1919, in which the defendant requests its correspondent at Berlin "to buy, under debit of our old account, the following War Loans, and to deliver them to the addresses mentioned below." Then follow four separate orders, the first of which reads: "Mk 10,000 - Fifth German War Loan, to be delivered to the Reichsbankstelle, Kempten, Bayern, for account of Mr. Johann Strauss, Chicago, Ill." The Berlin bank wrote the defendant under date of February 20, 1920, referring "to your letter of October 6, 1919, and our letter of January 15, 1920, according to which there have been transmitted by us" to the bank at Kempten for account of the plaintiff, "Mk 10,000 - 5 per cent German Government Bonds, A/O." In this letter the Berlin bank further advised the defendant that to an inquiry of the bank at Kempten, made by them sometime previous, as to the address of the plaintiff, the Berlin bank had replied to the Kempten bank that the latter was to address the confirmation to "Mr. Johann Strauss, c/o State Commercial & Savings Bank," adding that they assumed that a direct communication from Mr. Strauss might be expected. The Berlin bank further advised the defendant that on that day they had received "the War Loans in question" back from the bank at Kempton, with the remark "Returned on account of incomplete address of Mr. Johann Strauss." The Berlin bank then went on to say in this letter, that they had taken these bonds "into

your depot and look forward to your further news in this matter."

Under date of March 18, 1920, the defendant again wrote their Berlin correspondent, in reply to the letter from its correspondent dated January 20, referred to in the letter from the Berlin bank dated February 20, but apparently before the letter of February 20 had reached the defendant, and in this letter of March 18, the defendant acknowledged receipt of the letter of January 20, "regarding the Mk 10,000 - 5 per cent German Government bonds transferred by you" to the bank at Kempten for account of the plaintiff, "and request you hereby to again send the same to the above mentioned bank and to notify them of the complete address of Mr. Johann Strauss, 1522 N. La Salle Street, Chicago, Ill."

It may be noted here that the plaintiff began this suit against the defendant on April 18, 1920. There is further correspondence in the record between the defendant and the Berlin bank following this date. Under date of April 24, 1920, the Berlin bank wrote the defendant acknowledging receipt of its letter of March 18, and advising the defendant that according to the instructions contained in that letter, they had again sent the bonds to the bank at Kempten "for account of Mr. Johann Strauss, 1522 N. La Salle Street, Chicago, Ill. The pieces we have taken out of your depot." Under date of May 28, the Berlin bank again wrote the defendant, referring to its previous letter of April 24, to

which reference has just been made, and advising the defendant that the bonds had again been returned to the Berlin bank, as the bank at Kempten had refused to take them. In this letter the Berlin bank further advised the defendant that in reply to an inquiry directed to the bank at Kempten, regarding the refusal of the latter to accept the bonds, the Kempten bank had replied, "that the beneficiary of the bonds is unknown here and that he never reported to us. Furthermore, the Reichsbankanstalten of the Province are not allowed to accept open depots, but this is reserved by the Bureau of Effects, Berlin." The Berlin bank closed this letter by advising the defendant that they were "taking the bonds in your depot again and look forward to your respective instructions."

Under date of June 28, 1920, the defendant wrote the plaintiff advising his that its correspondent at Berlin had, "according to their letter of May 28, of this year, on different occasions sent those papers to the Reichsbank sub-station, at Kempten, Bavaria. The bank writes, however, that the papers were returned in every instance with the remark that you were unknown at the bank, and that the bank at Kempten for this reason refused acceptance of the papers. We therefore ask you to kindly give us your further instructions."

The last letter from the Berlin bank to the defendant, with reference to these bonds, so far as the record shows, was dated January 10, 1921, referring to aletter from the defendant to the Berlin bank of December 1, 1920, and saying: "We cannot find that an attorney has communicated with us in this

which reference has just been made, and bearing the distinctive mark the banks have again been returned to the Berlin bank, on the bank at Angeles had returned to Edo then. In this letter the Berlin bank further revealed the information that in regard to an inquiry discovery to see bank on Hongkong, regarding the refund of the bankers or money the bank, the Hongkong bank had replied, "when the responsibility of the money is returned here has been be never received to us. Nevertheless, the circumstances of the Prussian act not claimed it issued upon society, but will be received by the bureau of Attorney, Berlin." The letter bank closed this letter by assuring the directors that they were "taking the bank in very high regards and look forward to just prosperity indefinitely."

Under date of June 20, 1883, the directors wrote the CASHIER advising him that the correspondent of Berlin bank, "according to their letter of May 19, of this year, the different presidents had their papers to the Reichsbank and Berlin, at London, Europe. The bank writes, however, that the papers were returned to every institution with the remark that you were ignorance of the bank, but that the head of Lower the the Bile prince refused expressions to the reports. In effective the bank is highly glad to give further information."

The last letter from the Berlin bank to the Yokohama bank, with reference to Ebsen Banks, on the by the Berlin branch was dated January 10, 1883, referring to letters from the Yokohama and to the Berlin bank of December 1, 1882, and saying "We account find that on in former has commenced work on in with

matter," and asking for his (plaintiff's) name and address, so that we can make further investigation." In this letter the Berlin bank goes on to say that "We informed Mr. Strauss at the time that the bonds are being kept in your depot, attached by the Alien Property custodian. Furthermore, we notified the father of Mr. Strauss, Mr. Strauss in Kempten, at the time, in answer to his inquiry, that we had received your order to deliver Mk 10,000 - 5 per cent German Government bonds to the Reichsbank in Kempten, for account of Johann Strauss, in 1919, and that the bonds had been returned to us with the remark that a Mr. Strauss was unknown and had never reported, and furthermore, that the Reichsbankanstalten of the Province are not allowed to accept open depots but that this is reserved to the Bureau of Effects in Berlin. We further added that in order to forward the bonds again we would have to have further instructions from you, and referred Mr. Strauss to you."

The plaintiff himself testified that when he went to Germany in 1921, he went to the bank at Kempten and inquired about these bonds; that he learned the bonds were "transferred in 1920 to Kempten. The bank refused to take it because it was too long from 1917 to 1921;" that the Kempten bank said; "it didn't take the bonds because they didn't know me any more at this time. My father was making business with the Reisbanksterling in Kempten over there;" and that he was told by the Kempten bank that the "money was back in the Berlin bank." He was then asked whether they daid it was money or bonds, and he answered, "Bonds." He further testified that he was told by the Berlin bank that "they had no correspondence

matter," and asking for his (plaintiff's) name and address, so that we can make further investigation." In this letter the Berlin bank goes on to say that "We informed Mr. Strauss at the time that the bonds are being kept in your depot, attached by the Alien Property custodian. Furthermore, we notified the father of Mr. Strauss, Mr. Strauss in Kempten, at the time, in answer to his inquiry, that we had received your order to deliver Mk 10,000 - 5 per cent German Government bonds to the Reichsbank in Kempten, for account of Johann Strauss, in 1919, and that the bonds had been returned to us with the remark that a Mr. Strauss was unknown and had never reported, and furthermore, that the Reichsbankhauptstelle of the Provinces are not allowed to accept open deposits but that this is reserved to the Bureau of Estates in Berlin. We further added that in order to forward the bonds again we would have to have further instructions from you, and referred Mr. Strauss to you."

The plaintiff himself testified that when he went to Germany in 1921, he went to the bank at Kempten and inquired about these bonds; that he learned the bonds were "transferred in 1920 to Kempten. The bank refused to take it because it was too long from 1917 to 1921;" that the Kempten bank said; "It didn't take the bonds because they didn't know me any more at this time. My father was making business with the Reichsbankstelling in Kempten over there;" and that the was told by the Kempten bank that the "money was back in the Berlin bank." He was then asked whether they said it was money or bonds, and he answered, "Bonds." He further testified that he was told by the Berlin bank that "they had no correspondence

before 1920 on account of the State Commercial & Savings Bank; that the Berlin bank had transferred the bonds to the bank at Kempten and the latter had returned them "because I was not known anymore at this time." He further testified that his brother was still in business at Kempten in 1920. We have previously referred to the fact that on cross-examination, while on the witness stand in rebuttal, the plaintiff, admitted that in a talk he had with Mr.Stein, of the defendant Bank, before he went to Germany, he told him that he would ask for the bonds when he got over there.

It is entirely clear from this evidence that bonds were purchased by the defendant, pursuant to the order given to the defendant by the plaintiff on March 23, 1917, and that they were delivered by the defendant's correspondence at Berlin to the bank at Kempten, as directed by the plaintiff, and as contemplated by the terms of the receipt which the defendant gave the plaintiff at the time the latter paid over the money for which he is now suing. The proof tends to show that this was not accomplished however, in 1917, at the time the defendant attempted to execute the plaintiff's order, by its letter of March 24, 1917, the day after the plaintiff delivered his order to the defendant. If there were any question about the action of the defendant in fulfilling the plaintiff's order after the war was over and negotiations with Germany could be resumed, when they directed their correspondent at Berlin to send the bonds to the bank at Kempten for the plaintiff, in 1919, that, in our opinion, cannot be considered material, in view of the fact that after that time the plaintiff was repeatedly told that the bonds

had been sent to the bank at Kempten, and was ultimately told that the latter bank had declined to accept them and that they were back in the bank in Berlin, subject to his order, after which time the plaintiff went to Germany and before leaving told the defendant that when he got over there he would, ask for the bonds. In doing that, the plaintiff confirmed what had been done, and it is perfectly clear from the record that when he was in Germany in 1921, he attempted to get his bonds. Just why he did not succeed is not clear from the record, except that it does appear that the bonds had been attached by the Allien Property Custodian. It would seem to be clear from all the evidence, that the plaintiff was quite satisfied until it appeared that the bonds were either of little value or were involved in an attachment by the Allien Property Custodian in Berlin, when he concluded that he would be better off if he could get his money back.

It is urged by the plaintiff in support of the judgment that the bonds which were sent to the bank at Kempten, as a result of the correspondence of the defendant with the Berlin bank, were not the kind of bonds which he directed the defendant to buy. The order given by the plaintiff was for the purchase of 5 percent German War Loan bonds. The bonds sent by the Berlin bank to the Kempten bank, for account of the plaintiff, are described as 5 percent Government bonds. It may not be concluded from that that the bonds sent to Kempten were not War Loan bonds. The Berlin bank sent the bonds to the Kempten bank, pursuant to instructions from the defendant, in its letter of October 6, 1919, in which the directions given were for bonds of the "Fifth German War Loan." We find nothing in the record to support this conten-

contention of the plaintiff, beyond some remarks of counsel in the trial court, in the course of a colloquy between counsel, in which the statement was made that Government bonds were different from War Loan bonds. No evidence was introduced to that effect. All the bonds referred to throughout the correspondence, were five per cent bonds. In the letter from the defendant to the plaintiff, under date of June 26, 1920, in which the plaintiff was advised as to what had taken place, and was asked for further instructions, the defendant refers to the bonds as government bonds, but the plaintiff made no point of that at that time. On the contrary, he later told the defendant that he was going over to Germany, and that when he got over there he was going to ask for his bonds; and the evidence shows that he did so.

In our opinion, on the whole evidence, it may not be said that there was any liability on the part of the defendant Bank to return the money sued for, to the plaintiff. The bonds ordered were purchased; they were delivered to the bank at Kempten as agreed; they were returned to the Berlin bank, without any fault of the defendant's. Pursuant to instructions from the defendant the Berlin bank made repeated attempts to induce the bank at Kempten to take the bonds, giving specific instructions as to the name of the plaintiff on whose account they were sent, and also his address. With knowledge of the situation, the plaintiff went to Germany and tried to get his bonds. If he could not succeed in that, by reason of some action of the Alien Property Custodian in Germany, that furnishes no reason why the defendant bank should be liable for the value of the bonds, as of date there were ordered,

or for the money paid it by the plaintiff.

For the reasons stated the judgment of the Superior Court is reversed.

JUDGMENT REVERSED.

O'CONNOR, P. J. AND TAYLOR, J. CONCUR.

378 - 29036

JACK M. KATZ AND SAM GROSS,
Appellees,

v.

ILLINOIS SMELTING & REFINING CO.,
a corp.,
Appellants.

236 I.A. 634

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed December 24,1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Company seeks to reverse a judgment for $487.37, recovered against it by the plaintiffs in the Municipal Court of Chicago.

This was an action of the fourth class, brought by the plaintiffs to recover the purchase price of a quantity of yellow brass borings, which, according to the statement of claim, were sold by the plaintiffs to the defendant in June, 1923, and which were delivered to and accepted by the defendant. The defendant filed its appearance on July 9, 1923, and on that date the court entered an order, on motion of the defendant, extending the time for the filing of an affidavit of merits, ten days. On July 19, 1923, the defendant filed its affidavit of merits, and on July 24, 1923, on motion of the plaintiffs it was stricken and the court entered an order granting the defendant five days, within which to file an amended affidavit of merits. On July 27, 1923, the defendant filed itsamended affidavit of merits. The affidavit was executed by one Strauss, who stated therein

that he was the secretary of the defendant company and that he verily believed the defendant had a good defense to the suit, upon the merits, to the whole of the plaintiffs' demand, and that the defense of the defendant was that it had purchased from the plaintiffs and the plaintiffs had sold to it and promised to deliver, 1025 pounds of Monel metal in May, 1922, for $82.00 and 3100 pounds German Silver metal, in July, 1922, for $155.00, - the two items amounting to $237.00; that the defendant had been induced, by the statement and promises of the plaintiffs, to pay them said amount, and had paid said amount of $237.00 for said metals so sold and promised to be delivered, yet, the plaintiffs had not fulfilled their contract and did not deliver the said 1025 pounds of Monel metal and the said 3100 pounds of German Silver metal, to the defendant and had never delivered said material, wherefore, the defendant claimed from the plaintiffs said amount of $237.00, and prayed judgment for that amount against the plaintiffs and in favor of the defendant, and claimed a set-off to that amount against the claim of the plaintiffs. On August 4, 1923, on motion of the plaintiffs, this amended affidavit of merits was stricken, and thereupon the court proceeded to find that the defendant was in default, for want of an affidavit of merits, and an order of default was entered, and the court found the damages to be as stated in the affidavit of claim, which had been duly filed by the plaintiffs, and entered the judgment appealed from.

In our opinion, the judgment was erroneously entered. In effect, the amended affidavit of merits, which was filed within the proper time, admitted that the defendant owed the

which he was the bookkeeper of the defendant company and that he verily believed the defendants had a good defense to the suit, upon the merits, to the whole of the plaintiff's demand, and that the defense of the defendant was that it had performed their the plaintiffs and the plaintiffs had made it and produced to delivery, 1000 pounds of dried meat in May, 1000, for 100.00 and 8000 pounds German silver metal, in July, 1000, for 2500.00, - the two items mentioned in Ex.D; that the defendants had been induced, by the representations and promises of the plaintiffs, to pay them such amounts and but paid such amount of $500.00 the said metals or meat and proved to be defective, yet, the plaintiffs had not fulfilled their contracts and did not deliver the said 1000 pounds of dried meat and the said 8000 pounds of German silver metal, so the defendant had been caused pecuniary and material relinquishment, the defendant claimed from the plaintiffs said amount of $500.00, and proved requests for that amount against the plaintiffs and in favor of the defendant, and alleged a set-off to that amount against the claim of the plaintiffs. In regard i. 1907, on account of the plaintiffs, this amended affidavit of merits was admitted, and therefore the court proceeded to find that the defendant was in default, for want of an affidavit of merits, and an order of default was entered, and the court found the damages to be as stated in the affidavit of claim, which had been duly filed by the plaintiffs, and entered the judgment appealed from.

In our opinion, the judgment was erroneously entered. In effect, the amended affidavit of merits, which was filed within the proper time, averred that the defendant owed the

plaintiffs the amount sued for, but interposed a claim for set-off against that amount to the extent of $237.00. The Municipal Court Act provides, in section 43, (Cahill's Ill. Statutes, ch. 37, par. 431) that in case a defendant desires to present any set-off or counter claim, he shall file a statement thereof with his appearance or within such extended time as the court may, in its discretion, permit. Contrary to the contention of the plaintiffs, we are of the opinion that the claim for set-off was for a liquidated amount, although, as counsel for the plaintiffs points out, the affidavit does not state that no metal of any kind was delivered under the agreements between the parties, which are set up in the defendant's affidavit. That affidavit was merely to the effect that the defendant had purchased certain metals of the plaintiffs, as therein set forth, at certain amounts, and the plaintiffs had agreed to deliver the metals so purchased; that the defendant had paid the purchase price of $237.00 but the plaintiffs had never delivered the metals, wherefore, the defendant claimed a set-off and sought to recover the $237.00 which had been paid the plaintiffs for the metals. Of course, under that affidavit of set-off the defendant could not be permitted to make proof of some claim for damages, because of the failure of the plaintiffs to deliver the metals of the proper quality, but that point is not involved here. The affidavit as it stands is for a liquidated amount, and on the pleadings as they stood after that affidavit had been filed, we are of the opinion that the trial court might have properly entered judgment against the defendant for the difference between the plaintiffs' claim, which was in effect admitted by the defendant's affidavit, and the liquidated amount claimed by the defendant by way

of set-off, and directed the parties to proceed to trial as to the balance, but it was error to strike the defendant's amended affidavit of merits, although it might strictly be construed as an affidavit of set-off, and enter judgment forthwith on the plaintiffs' affidavit of claim.

The plaintiffs contend that inasmuch as the record in this case fails to contain a bill of exceptions, the striking of the affidavit of merits and entering judgment is not subject to review. Under the rules of the Municipal Court which are contained in this record, demurrers are abolished but provision is made for striking pleadings on motion. Where it is obvious, as it is here, that a motion to strike has been treated as in the nature of a demurrer, we shall treat it as such, and pass on the sufficiency of the pleadings In such case a bill of exceptions is neither necessary nor proper.

For the reasons stated, the judgment of the Municipal Court is reversed and the cause is remanded to that court.

JUDGMENT REVERSED AND CAUSE REMANDED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

396 - 39054

THE SOUTHWESTERN MILLING CO., Inc.,
Appellant,

v.

FRANK G. CLARK,
Appellee.

236 I.A. 634

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed December 24,1924

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Milling Company brought this action against the defendant Clark, for damages for an alleged breach of contract for the sale of flour. By its declaration the plaintiff alleged that the parties entered into a contract on December 17, 1919, under which the plaintiff agreed to sell and the defendant agreed to buy, 2000 barrels of flour at a stipulated price; that under the terms of the contract, the flour wasto be ordered out by the defendant within sixty days from the date of the contract, and that the seller was to make shipment within fourteen days after receipt of shipping instructions from the buyer. It was further alleged that shipping instructions were received by the plaintiff from the defendant on February 7, 1920, and that thereafter on or about February 14, 1920, the plaintiff shipped two cars of 400 barrels each, and one of 325 barrels, to the defendant; that on February 17, 1920, the defendant requested the plaintiff not to ship any flour not already shipped; that the defendant accepted one of the 400 barrel cars and the car containing 325 barrels but refused to accept

Opinion filed December 24, 1934

Mr. Justice Thomson delivered the opinion of the court.

The plaintiff Building Commission brought this action against the defendant Clark, for damages for an alleged breach of warranty for the sale of Zenol. In its complaint the plaintiff alleges that the parties hereto entered into a contract on January 17, 1931, under which the defendant agreed to sell and the plaintiff agreed to buy, from certain at times at a stipulated price; that before the time of the contract, the Clark also to deliver to the plaintiff within sixty days from the date of the contract, the total the seller was to make shipment within fourteen days after receipt of shipping instructions from the buyer. It was further alleged that shipping instructions were received by the plaintiff from the defendant on February 7, 1931, and that shipment on or about February 14, 1931, the plaintiff stopped the work of its outside men, and due of the breach, to the defendant, that on February 17, 1931, the defendant repudiated the plaintiff and to ship any Zenol and alleged that the individual composed one of the Ohio Central area for the manufacture of its beverage but relied on the

the third car containing 400 barrels, and that the loss occasioned to the plaintiff by said refusal, was $538.24. The defendant filed a plea of the general issue and an affidavit of merits, in which the defendant denied that the 400 barrel car in question was shipped within fourteen days after the defendant gave the plaintiff shipping directions therefor. The issues thus formed were submitted to a jury, resulting in a verdict for the defendant. Judgment followed accordingly, to reverse which the plaintiff has perfected this appeal.

The car involved in the controversy between the parties is referred to throughout the evidence as car No. 37061. Both parties, in the briefs filed in this court, state that the sole issue involved in the trial of the case was whether or not that car was shipped by the plaintiff within fourteen days after shipping instructions were given by the defendant. The defendant, however, adds a provision to that statement, to the effect that the shipment of the car, to be within the contract, must also have been within sixty days from the date of the contract. With that proposition we are unable to agree. In our opinion, under the terms of the contract, if the defendant buyer gave the plaintiff shipping instructions for a car of flour at anytime within sixty days from the date of the contract, and the plaintiff shipped it out any time within fourteen days after the receipt of shipping instructions, the defendant would be bound, under the contract, to accept and pay for it.

It is agreed that the shipping instructions involved weregiven to the plaintiff by the defendant on February 7,

1930. The plaintiff contends that car #37061 was shipped out, pursuant to those instructions, on February 16, while the defendant contends that it was not shipped until after February 21.

The plaintiff contends that the trial court erred in refusing to direct a verdict in its favor, while the defendant contends that the question of whether the car was shipped within fourteen days from the receipt of shipping instructions, was a question of fact for the jury to determine.

One Anthon, Chicago manager of the plaintiff Company, whose mill was located at Kansas City, Missouri, testified to receiving the shipping instructions from the defendant on February 7. He further testified that on February 17, he received a letter from the defendant, stating that inasmuch as none of the flour involved in the contract had been shipped, and the plaintiff had had shipping directions in hand for some time, he (the defendant) had elected to cancel the contract, by reason of the delay in shipment. This witness then testified that upon receipt of this letter , he called up the defendant and talked with him about the letter, and the defendant said he would take all the flour that had then been shipped; that about a week later, the car in question arrived in Chicago over the Chicago, Great Western Railroad, and that about four days after that, another car arrived; that the defendant accepted the last car but rejected the first one, which was #37061. He further testified that according to the plaintiff's records these two cars were both shipped from the plaintiff's mill on February 16, and that when he talked to the defendant over the telephone, on the evening of February 17,

time. The plaintiff contends that her STOCK was shipped on, between 7 and [illegible], on February 15, while the defendants contends that it was not shipped until after February 22.

The plaintiff contends that the total money owed is returning to direct a verdict in the [illegible], while the defendants that the question of whether the [illegible] within [illegible] days from the receipt of [illegible] instructions, was a question of fact for the jury to determine.

Our Judge, Bishop Hungry of the plaintiff Company, whose mill was located at Kansas City, Kansas, testified to receiving the [illegible] instructions [illegible] February 7. On [illegible] morning [illegible] February 12, he received a letter from the defendants, stating that [illegible] as some of the [illegible] [illegible] [illegible] pad, and he already [illegible] [illegible] for some time, he (the [illegible]) had [illegible] to cancel the contract, by reason of the delay in shipment. [illegible] testified that upon receipt of that letter, he [illegible] the [illegible] and talked with him about the letter, and the defendants said he would take all the flour that had been [illegible] shipped, that about a week later, the car in question arrived in Chicago over the Chicago, Great Western Railroad, and that about two days after that, another car arrived; that the defendants accepted the last car but rejected the first car, which was [illegible]. He further testified that according to the [illegible]'s records there was one more load shipped from the plaintiff's mill on February 16, and that about be called to the [illegible] over the telephone, on the evening of February 17,

after receiving the defendant's letter on that day, he told him that two cars had been shipped, and the defendant said he would accept those cars.

One Templeton, an agent of the Chicago Great Western Railroad, at Kansas City, identified a document which was referred to in the evidence as an interchange between the Kansas City Terminal Railroad and the Chicago Great Western Railroad, which was a part of the permanent records of the latter. This document was introduced in evidence. It is entitled, "Daily Interchange Report of Cars." It bears the date of February 16, 1920 and records the transfer of car #37061, loaded with flour, at 11:10 A.M. from Kansas City Terminal Railroad to the Chicago Great Western Railroad. This witness then identified the original bill of lading, which was a part of the permanent records of the Chicago Great Western Railroad. This document was also introduced in evidence. It likewise was dated February 16, 1920, and recites the receipt of car #37061, containing 400 Barrels of flour, consigned to the order of the plaintiff and reading "Destination, Frank G. Clark, 180 W. Jackson Boulevard, Chicago, Illinois."

One Hughes testified that he was employed by the plaintiff as a checker and that his duties were to supervise the loading of cars; to see that all the cars were sealed and to make out the seal records. He then identified an original record of the car in question and stated that it was in his hand writing; was made on the date it bore and that it correctly stated what he did with respect to checking that

after reading the defendant's letter on that day, he told him that two cars had been shipped, and the defendant said he would accept those cars.

The Complainant, an agent of the Chicago Great Western Railroad, at Kansas City, identified a document which was referred to in the evidence as an interchange between the Kansas City Terminal Railroad and the Chicago Great Western Railroad, which was a part of the permanent records of the agent. This document was introduced in evidence. It is entitled, "Daily Interchange Report of Cars." It bears the date of February 16, 1920 and contains the entry— Receipt of car 17751, loaded with flour, at 11:10 A.M. from Kansas City Terminal Railroad to the Chicago Great Western Railroad. This witness also identified the original bill of lading, which was a part of the permanent records of the Chicago Great Western Railroad. This document was also introduced in evidence. It disclosed was dated January 13, 1920, and covered the shipment of car 17751, containing 440 barrels of flour, consigned to the order of the plaintiff and bearing "Destination, Frank M. Clark, 330 N. Michigan Avenue, Chicago, Illinois."

One Hughes testified that he was employed by the plaintiff as a checker and that his duties were to supervise the loading of cars; to see that all the cars were sealed and to make out the seal records. He then identified an original record of the car in question and stated that it was in his hand writing; was made on the date it bore and that it correctly stated what he did with respect to checking that

car. This document covered car #37061, and read in part, "Date loaded, 2/14/20." This document contained a line at the bottom, reading: "We certify the above account to be absolutely correct. Checked and loaded by Swede; rechecked by Hughes," (The witness).

The invoice which was afterward received by the defendant, covering this car, had attached to it a copy of this "certificate of count and seal record" the original of which was produced and testified to by the witness Hughes, and this copy attached to the invoice conforms to the original, except that it reads; "Date loaded, 2/21/20." This is the basis for the defendant's contention that the car was loaded on February 21, and not having been loaded until that date, could not have been shipped until sometime after that date, Apparently this copy of the certificate of count and seal record, which was forwarded by the plaintiff to the defendant with the invoice, was not a carbon copy of the original, as the wording of the two documents is not exactly alike. For instance, the original produced and testified to by the witness Hughes, reads, "We certify the above account to be absolutely correct. Checked and loaded by Swede. Re-checked by Hughes. Finished, Night Shift." whereas the copy attached to the invoice reads, "We certify the above account to be absolutely correct. Night Shift. Checked by Swede. Re-checked Hughes."

One Simmons testified that he was a clerk for the Kansas City Terminal Railway Company. He identified an original record in his own hand writing, made out on February 16, which

he testified was "a record of the two cars from the Kansas City Terminal to the Great Western * * * The numbers on the cars were 37061, Illinois Central" (the car in controversy) "and 185721, B.& O." (A car which the defendant accepted and paid for) "These cars were at Mill street when I made the record. They were in a made-up train, one of our own trains. It was bound for the Chicago Great Western Railroad and it was delivered to the Chicago Great Western at 11:10 A.M." That document was also introduced in evidence, bearing the date and car numbers testified to by the witness. On cross-examination this witness testified that car 37061 was made up in the train referred to; that he saw the car delivered to the Great Western,—"I went over with it. I rode the train all the way through. I saw the car delivered to the Great Western."

One Robinson testified that he was a railway clerk, "with the Belt Line and Terminal," at Kansas City; that he had the original record s of the checks he made on the 13th, 14th, and 16th of February for the cars on the Southwestern Milling Company track. February 15, fell on Sunday. The witness was handed the records he referred to, and he examined them and testified that when he made a check on Februaty 13, at nine o'clock, car 37061 was not on the Milling Company's track; that he made a list of all cars on the tracks, both loaded and empty, and this car was not there ar nine o'clock in the morning; that on that day, February 13, at 3:10 in the afternoon, car 37061 was placed on the Milling Company's track as an empty for loading; that on the next day he checked this

—

In accordance with the request of the 3rd Army from the Tuesday (19) received in the Grand Duchy " " - The business on the main road STOCK, Illinois Central" (the one in Washington) "and LIBERTY, N.Y. O." (a one which the determined engineers in this zone) "Those day was as bit clever when I made the remark. They also in a modern train, one of our own trains. In the Signal in the Grand Duchy Luxembourg believe that it was delivered to the Bridge Road Company in Lily, Ill. They changed our line connected in Wilton. Trying my hand was our machine destined to by the village. My acquaintance this afternoon mentioned that our STOCK was made up in the train returned by, that in our the day delivered to the Grand Duchy." "I said over with it. I know the train all the way through. I was the one delivered to the Grand Duchy."

The Wilkins Situation that is had a pretty bad. "When we left the Old Kingdom," at Tuesday night, that to had the initial round a of the stocks be made on Jan 16th, 16th, and 19th of February for the work on the Southwestern Mining Company train. February 18, fell on Sunday. The winner was should the reason be referred to, and be remained then not installed they was be made a check on February 18, as also a "clock, our STOCK was not on the Mining Company's track that I be made a list of all in the valley, both loaded and empty, and take our run there or have orders in the morning that on that day, February 18, at 8:10 in the afternoon, our STOCK was placed on the Mining Company's track as an empty for loading that in the next day to charged this

track at 9:10 in the morning and car 37061 was there as an empty for loading; that the next check he made on this track was on Monday morning, February 16, at 9:10, and at that time the car was not there.

One Sterling, Traffic Manager of the plaintiff Company, at Kansas City, identified the various shipping directions received from the defendant for the flour covered by this contract, the last of which was dated February 7, 1920. These directions were to the effect that two cars of 400 barrels each. were to be shipped out, followed by two cars of 325 barrels each, and then two cars of 310 barrels each. Apparently the two 400 barrel cars and one of the 325 barrel cars were shipped and the defendant accepted and paid for one of the 400 barrel cars and the 325 barrel car, but declined to accept the other 400 barrel car, because the copy of the certificate of count and seal record attached to the invoice, recited that this car was loaded February 21.

One Holmes, assistant auditor of the Continental Commercial National Bank of Chicago, identified the original draft, drawn by the plaintiff Milling Company on the defendant, covering "Car No. 37061," and dated, "Kansas City, Mo. 2-18-20."

One Ryan testified that on February 16, 1920, he was a clerk and general agent at Kansas City for the Chicago Great Western Railroad. He identified the bill of lading covering this car and testified that he saw it on February 16. 1920; that it was made out by the Southwestern Milling Company and signed by the Chicago Great Western Railroad, and returned

Thence at 9:10 in the morning and our [illegible], was found on an [illegible] for landing that the most above be made on this [illegible] was on Monday morning, February 16, at 9:10, and at that time the [illegible] was not there.

The [illegible], Pontiac Manager of the plaintiff Company, in Kansas City, identified the various documents [illegible] received from the defendant for the flight covered by this case. The last of which was dated January 7, 1960. [illegible] [illegible] made. Note to be utilized and, [illegible] the [illegible] Pontiac work, and that the [illegible] of [illegible] [illegible] [illegible] the 400 Barrel Cone and the 500 Barrel Cone, but declined to accept the other 400 Barrel Cone, because the [illegible] of the [illegible] of [illegible] and [illegible] attached to the [illegible] [illegible] [illegible] [illegible].

The [illegible], assistant cashier of the Continental Commercial National Bank of Chicago, identified the [illegible] [illegible], shown by the plaintiff Airline Company on the [illegible] [illegible], [illegible] [illegible] "[illegible]" and [illegible], "[illegible] City, [illegible]".

The Open Contract that on February 16, 1960, he was a duly [illegible] general agent in Kansas City for the Chicago Cargo Carriers Airlines. He identified the bill of lading covering this one and [illegible] that he on Saturday [illegible] February 16, 1960; that it was made out by the Continental Airline Company and signed by the Chicago Cargo Carriers Railroad, and returned

to the shipper after being signed by the Railroad Company. This document read in part, "Received, Subject to the classifications and tariffs in effect on the date of issue of this original Bill of Lading, at Kansas City, Mo. Feb. 16/30 from the Southwestern Milling Company, Inc. the property described below * * * consigned to Order of Southwestern Milling Company, Inc. Destination Chicago, State of Ill. Notify Frank G. Clark, at 160 West Jackson Blvd., Chicago, Ill. C.G.W.R.R. Car initial IC, Car No. 37061."

The only witness for the defendant was the defendant himself. He introduced in evidence his letter to the plaintiff dated February17, 1930, to which reference has already been made. The defendant then testified to the conversation he had with Anthon, on the evening of the day this letter was sent, in which Anthon told the witness that he had received his letter but that there were two cars in transit, and that he told Anthon that if there were two cars in transit, he would accept them; that Anthon did not say what cars they were and that the witness did not remember their numbers off-hand but he thought they were 185,721 and 33,528; that he accepted the two cars and paid for them. The defendant introduced in evidence the invoice covering the car in question, dated February 16, 1930, attached to which was the copy of the certificate of count and seal record, which, as already stated, indicated that the car was loaded on February 21. The defendant also introduced a copy of the invoice on the other 400 barrel car, which he accepted and paid for; and also a copy of the certificate of count and seal record on this car, which was attached to that invoice. This record read, "Date loaded,

2/14/20." The defendant then introduced a letter which he wrote the plaintiff under date of February 24, acknowledging receipt of the plaintiff's invoice covering car 37061, and saying: "Will you kindly advise me the date this car was loaded at your mill, as I am unable to make out the date from your count and seal record." It would seem from this that the date of the loading of this car, as stated on the copy of the certificate of count and seal record attached to the invoice, was somewhat illegible, although nothing is said about this in the testimony, beyond the reference to that subject made by the defendant in the letter just referred to. None of these original records appear in the bill of exceptions. They were all read into the record and appear there as typewritten copies. The defendant next introduced a letter sent him by the plaintiff in reply to this letter of February 24, in which the plaintiff acknowledges receipt of that letter and states that car 37061 was loaded "on the 16th, there being an error in the date of the loading list which was sent you." In reply to this letter the defendant wrote the plaintiff, on the following day, February 26, acknowledging receipt of the plaintiff's letter of the 25th, advising him that an error had been made in the certificate attached to the invoice of car 37061. In this letter the defendant goes on to say, "On the bottom of the loading ticket there is an affidavit certifying to the correctness of the tickets. To complete my files will you kindly send me another loading ticket, properly certified, that is really correct." In that statement the defendant was not entirely accurate.

The language at the bottom of the loading ticket, to which he refers, does not amount to an affidavit, but is an unsworn statement certifying to the correctness of the data set forth in the loading ticket which is a part of the certificate of count and seal record. In reply to the letter last referred to, the plaintiff wrote the defendant to the effect that its letter of February 25, was sufficient to correct the date of the loading ticket attached to the invoice on the car in question.

Apparently the defendant first took the position that the two cars shipped on February 16 were not within the contract time, because the period of sixty days from December 17, the date of the contract, would expire February 14th or 15th, for the record contains a copy of a letter dated March 1, 1920, from the plaintiff to the defendant, which was introduced in evidence by the defendant, in which this position of the defendant was referred to, and the letter goes on to state the position of the plaintiff with regard to the matter, and in this letter the plaintiff asks the defendant to advise itwhether he is going to refuse these two cars. On the following day, March 2, the defendant wrote the plaintiff acknowledging receipt of its letter of March 1, and in this letter he said, "I have arranged to take care of car #25380, shipped on the 14th and car #185731, shipped on the 16th but loading ticket is dated the 14th. Car #37081, your invoice dated February 16, loading ticket however is dated on the 21st and signed by two of your employees, I am refusing."

There was also introduced in evidence, apparently

The January 4th bulletin of the Landing branch, to which by reform, does not amount to an efficiency, but is an unnecessary statement certifying to the correctness of the data set forth in the landing blanks which is a part of the certificate of round and oval repairs. In reply to the letter last referred to, the plaintiff wrote the defendant to the effect that the letter of February 8th, was sufficient to correct the date of the landing blanks attached to the letters on the 4th in question.

Apparently the defendant first took the position that the 4th was delayed as February 16 were not within the statute file, because the period of sixty days from January 17, the date of the contract, which article Delivery (Art. 1184, the 1st clause) contains a loss of a letter dated Jan. 3, 1917, from the plaintiff to the defendant, with the lettuces in evidence by the defendant, in which this notice of the defendant was referred to, but the letter took to the effect the position of the plaintiff with regard to the matter, and in this letter the plaintiff made the determination to advise defendant he is going to refuse these two cars. On this February day, March 8, the defendant wrote the plaintiff acknowledging receipt of the letter of March 1, and in this letter he said, "I have arranged to take care of our PERCHO, shipped on the 14th and our PLANTS, shipped on the 15th but loading ticket is dated the 16th. Our PERCHO, your invoice dated February 16, loading ticket however is dated of the 21st and shipped by two of your employees, I am sorry."

There was also introduced in evidence, apparently

by the defendant, a letter written him by the plaintiff in reply to his letter of March 3, in which the plaintiff acknowledged receipt of that letter and the writer of the letter stated that he had been trying to find out "what the trouble is that you should maintain that car 37061 was loaded on the 21st, and I believe that I have found out. It seems that the boy on the shipping desk could not find the loading report which he mails out with the invoice. He, therefore, held the invoice for two or three days after the 16th and finally called up the mill and asked for another copy of the loading report which he received and mailed you, and the only way that I can figure it out is, that when the mill made out the copy of the loading report, instead of dating it on the day on which the original report was made, they dated it on the date on which they made out this copy, which was probably the 21st. * * * Car 37061 was loaded some time between Saturday evening, the 14th, and the time the loaded cars were pulled from the mill by the Railroad Company Monday morning, the 16th. We sometimes do bill cars ahead and load them after we bill them, but the greatest time that elapses in such cases is only twelve or twenty four hours and not anything like five days."

As already stated, the parties agreed that the sole question involved here is whether the carload of flour in question was shipped on February 16, as the plaintiff contends, or sometime after February 21, as the defendant contends. The only thing in the record which has any tendency whatever to show that the defendant's theory is correct,

is the fact that the copy of the certificate of count and seal record attached to the invoice on this car, stated that the car was loaded "2/21/20." The defendant contends that his claim is further corroborated; for on cross-examination the witness Anthon, testified that after the defendant had rejected the car in question, it was put into the plaintiff's warehouse in Chicago, sometime between February 28 and March 19, but that he could not say just when, because he did not have the records with him. The defendant argues that this was quite a long time after February 21, and tends to support the statement contained in the copy of the certificate of count and seal record, to the effect that the car was loaded on February 21. We are unable to appreciate the force of that contention.

As opposed to this copy of the certificate of count and seal record, attached to the invoice, which appears to have been made to take theplace of the original copy which had been lost, we have in the record a series of original documents constituting the records of both the plaintiff and the Railroad Company, all going to show, in our opinion, beyond any doubt, that this car was shipped by the plaintiff from Kansas City on February 16. First, we have the original Inter-change Record of Cars, taken from the permanent records of the Kansas City Terminal Railroad, dated February 16, (these reports being made daily) which shows that on that day at about 11 o'clock in the morning, both of these 400 barrel cars, being Car IC #37061 and Car B.&O. #185731, were delivered to the Chicago Great Western Railroad by the Kansas

In the first place the copy of the certificate of death and most recent attached to the inventory on this one, proved that the act was issued "[illegible]". The defendant contends that his claim is further corroborated by the [illegible] the alleged author, testimony that after the defendant had reported the loss in question, he was sent into the plaintiff's warehouse in Dallas, searching between February 20 and May 1, 19[illegible], but that he could not say just when, because he did not have the records with him. The defendant argues that this was quite a long time after February 20, and tends to more nearly the testimony contained in the copy of the certificate of death and that proved, so the effect that the one was issued on February 20. We are unable to appreciate the force of that contention.

An examination of this copy of the certificate of death and most recent, attached to the inventory, which appears to have been sent to the director of the [illegible] has been lost, we have in the issue a series of strained arguments concerning the records of both the plaintiff and the United Company, all going to show, in our opinion, beyond any doubt, that this act was signed by the plaintiff from Kansas City on February 20. Hence, we have the original [illegible] case of [illegible], which the testimony results of the Kansas City Tonsorial [illegible], dated February 20. (There records being made daily) which shows that on that day he closed 12 o'clock in the morning, both of these [illegible] [illegible], being the 20 [illegible] and the 8.00. Finally, were [illegible] by the Chicago Grand Jurors [illegible] by the [illegible]

City Terminal Railroad. Then we have the original record of the check of this transfer, made out in the handwriting of a witness who is produced and testifies that he made the record on February 16, and that at the time he made this record, which was taken from the cards on the cars, both the cars were in a made-up train which the witness saw turned over to the Chicago Great Western Railroad. Further, we have the original Bill of Lading on the car in question, which recites that this car was received by the Railroad on February 18, 1920. Then we have the original record made by the railroad clerk, whose duty it was to check the cars standing on the plaintiff's loading track daily, both the cars that were loaded and those that were empty, and from these records this witness testifies that the car in question was placed on that track, for loading, on February 13; that it was still there as an empty for loading on February 14; that February 15, was Sunday; that when he next checked the cars on this track, at 9:10 on Monday morning, February 16, this car was not there. Next, we have the original certificate of count and seal record on both of these cars and the witness in whose handwriting that record appears, testifies to its correctness, and that record states that both of these cars were loaded on February 14. In addition to these, the record contains the draft drawn on the defendant by the plaintiff, for the purchase price of the flour shipped in car 37061, which came to the Continental and Commercial National Bank of Chicago, with Bill of Lading attached. The record shows that there was a rubber stamp on the face of this draft reading, "City Collections. A -K, February 19, 1920, Continental and Commercial National Bank." We are unable to see how it could be possible for this car, not merely to have been in-

City Terminal Railroad. When we have the original records of the check of this transfer, made out in the handwriting of a witness who is produced and testified that he made the report on February 16, and that at the time he made this report, money was taken from the cards on the cars, but the cars were in a made-up train with the witness car turned over to the Chicago Great Western railroad. Further, we have the original Bill of Lading on the car in question, which proves that this car was received by the railroad on January 16, 1940. Then we have the original record made by the railroad clerk, whose duty it was to check the cars standing on the plaintiff's loading track daily, indicates cars that were loaded and those that were empty, and from these records this witness testifies that the car in question was placed on that track, for loading, on February 15; that it was still there as an empty for loading on February 16; that February 16, was Sunday; that when he next checked the cars on this track, at 9:10 on Monday morning, February 19, this car was not there. Last, we have the original certificate of bond had and said records on both of these cars and the witness is also testifying that second exhibit, testifies to its correctness, and that second states that both of these cars were loaded on February 15. [illegible] The record showing the draft drawn on the defendant by the plaintiff, for the purchase price of the flour shipped in car [illegible], which came to the Cook County and Commercial Bank of Chicago, with Bill of Lading attached. The second shows that there was a rubber stamp on the face of this draft reading, "Stop Deliveries. A - , February 19, 1940, Commercial and Commercial National Bank." We are unable to see how it could be possible for this car, not merely to have been in

voiced by the plaintiff to the defendant on February 18th but for a draft to have been drawn on that date, covering this car, and for a Bill of Lading on this car, issued on that date, to be attached to the draft and sent from Kansas City to Chicago and be in the hands of the Bank here for collection on February 19, two days before the car was loaded, as the defendant contends, is proven by a copy of a record, which was not a carbon copy, and which was attached to the invoice he received.

In our opinion, the evidence in the record is overwhelming to the effect that this car was shipped on February 18. If there can be said to be any evidence in the record to the contrary, it is but a mere scintilla. If there is but a scintilla of evidence, tending to prove the material averments of a declaration, the jury should be directed to return a verdict for the defendant. Libby, McNeill & Libby v. Cook, 233 Ill. 206 and cases cited. Similarly, if there is but a scintilla of evidence tending to support the contentions of a defendant and the plaintiff's case is properly supported by reliable evidence, a motion made by the plaintiff, to instruct the jury to find in its favor, should be allowed. We have set forth in detail the large amount of evidence, not only reliable but documentary, in its character, which, in our opinion, convincingly establishes the plaintiff's case. We are, therefore, of the opinion that the trial court erred in denying the motion of the plaintiff for a directed verdict, at the close of the evidence.

Wherever the judgment of a trial court, for a defendant, is reversed in this court, judgment for the plaintiff

vessel by the plaintiff on the Saturday or Tuesday that
had for a month to have been down on that line, travelling
one, and for a gill of rum on this one, turned on that
day, to be attached to the draft and sent from Lunenburg
to Halifax and be in the hands of the mate when the motion
was in Chancery 1?, two days before the sea had taken, or
had allegedly attached, be proved by a copy of a document which
was not a mere copy, and which was attached to the
be received.

In our opinion, the evidence in the record is
sufficient to the effect that this one was shipped on
January 12. If there can be said to be any evidence in
the record to the contrary, it is but a mere possibility.
It which is not a sufficient of evidence. Further, if
the material assumption of a delivery, the jury should
be directed to return a verdict for the defendant. Jones
v. Jones, [illegible] 1?1, 300 and cases cited.
Similarly, if there is but a possibility of evidence tending
to support the contention of a defendant and the plaintiff's
case is properly supported by reliable evidence, a motion
made by the plaintiff, to instruct the jury to find in his
favor, should be allowed. We have not found in Nova Scotia
large amount of evidence, and only reliable and documentary,
in the discovery, which, in our opinion, conclusively establish-
es the plaintiff's case. The rule, therefore, of the motion
that the trial court erred in denying the motion of the plain-
tiff for a directed verdict, on the close of the evidence.

Therefore the judgment of a trial court, for 6 costs-
and, is reversed in this court, judgment for the plaintiff

may be entered in this court provided the plaintiff made a motion for an instructed verdict in the trial court and it is the opinion of this court that such a motion should have been allowed. Adam, Adar. v. Columbian Natl. Life Ins. Co., 318 Ill. App. 54; Nelson v. McCarthy, Illinois Appellate Court, First District, case No. 38659, opinion filed June 25, 1924, not yet reported.

For the reasons stated, the judgment of the Circuit Court is reversed and judgment for the plaintiff, The Southwestern Milling Company, is entered in this court for $538.24.

JUDGMENT REVERSED AND JUDGMENT FOR
PLAINTIFF ENTERED HERE.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

may be entered in this state provided the plaintiff has a motion for a judgment vacated in the trial court that if the motion of this court that such a motion should have been allowed. Adm. Inst. v. Alexander Brit. Adm. Inst. Inc. 332 Ill. App. 481 Adams v. Schwartz, Illinois Appellate Court, First District, June 10, 1948, motion filed June 30, 1948, not yet reported.

For the reasons stated, the judgment of the Circuit Court is reversed and judgment for the plaintiff. The mandatory writing property, is remanded to this court for that.

Reversed, and judgment.
Reversed and remanded.

Affirmed, and judgment.

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|---|---|
| LOUIS GARVETTA, Appellee, v. JACK OSIOLA, Appellant. | 236 I.A. 634<br>APPEAL FROM SUPERIOR COURT, COOK COUNTY. |

Opinion filed December 24,1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $1519.13, recovered against him by the plaintiff in the Superior Court of Cook County, in an action in which the plaintiff sought to recover damages for an alleged breach of contract on the part of the defendant, by reason of his failure to ship goods of the quality called for by the contract, on which the plaintiff based his cause of action.

In his declaration the plaintiff alleged that the defendant had entered into a contract with him, under which he agreed to ship to the plaintiff at Chicago, from Fresno, California two cars of good, sound Muscatel grapes, for which the plaintiff agreed to pay the defendant at the rate of $100.00 per ton; that the defendant, notwithstanding his agreement, delivered one car load of Muscatel grapes which werenot good and sound, but which were green and unmerchantable, and which the plaintiff was obliged to sell in the market in Chicago for $745.00, the plaintiff thus losing the difference between the amount of the draft which he

paid, covering this car, and the amount for which he sold it, together with the profit he would have made had the grapes been as contracted for. The plaintiff further alleged that the defendant failed to deliver the second carload of Muscatel grapes, whereby the plaintiff was deprived of the profit he would have made on that car. Additional counts were afterwards filed by the plaintiff alleging that prior to the shipment of these grapes the plaintiff had contracted for their sale at $125.00 a ton; that they had been purchased for the purpose of manufacturing grape juice, and that the defendant had warranted to the plaintiff that they would be of the kind suitable for that purpose, but that the grapes received were unfit for use in the manufacture of grape juice.

The defendant filed a plea of the general issue, together with an affidavit of merits, in which he denied that he had agreed and promised to ship to the plaintiff "two carloads of good, sound Muscatel grapes, and says that he agreed and promised plaintiff that he would ship to plaintiff two carloads of good and sound grapes, the particular kind thereof to be left to defendant's option." In his affidavit of merits the defendant proceeded to set out that the facts surrounding the transaction between the parties were that they met each other in California, and the plaintiff, being called back to Chicago, before leaving California, requested the defendant, who was staying on there, to purchase two carloads of grapes for him, and the defendant agreed to do so; that on or about November 11, 1920, the defendant shipped the plaintiff a carload of good and sound Muscatel grapes from Fresno, this car containing about fourteen tons, at the price of

Bank, covering that car, and the demand for which he made it, together with the profit he would have made had the grapes been as represented for. The plaintiff further alleged that the defendant failed to deliver the second carload of inferior grapes, whereby the plaintiff was deprived of the profit he would have made on that car. Additional counts were afterwards filed by the plaintiff alleging that prior to the shipment of these grapes the plaintiff had contracted for their sale at a profit, a fact that they had been purchased for the purpose of manufacturing wine thereof, and that the defendant knew or should have known the purpose for which the plaintiff was entitled to the grapes purchased for the purpose of manufacturing wine therefrom.

The defendant filed a plea of the general issue, together with an affidavit of merits. In which he denied that he had agreed and promised to ship to the plaintiff "two carloads of good, sound Emperor grapes, and more than he agreed and promised plaintiff that he would ship to plaintiff two carloads of good and sound grapes, the particular kind thereof to be left to defendant's option." In substantiation of merits the defendant proceeded to set out that the letter evidencing the transaction between the parties was that they had had after in Oil Ferrin, and the plaintiff, being unable to obtain, before leaving California, requested the defendant, who was staying on there, to purchase two carloads of grapes for him, and the defendant agreed to do so; that on or about August 12, 1920, the defendant shipped the plaintiff a carload of good and sound Emperor grapes from Fresno, that he notified plaintiff thereon that, at the price of

$100.00 per ton; that the grapes in this shipment were good and sound and that the defendant denied that they were green and unmerchantable. Further, the defendant stated in this affidavit of merits, that he had no knowledge of what the plaintiff sold these grapes for, and he demanded proof of this fact. He further alleged that after this car of grapes was shipped, and before it arrived in Chicago, the grape market fell off more than fifty per cent, which is the reason why the plaintiff received such a small amount for these grapes. The defendant made further specific denials of various allegations made by the plaintiff in his declaration, and he then set forth that he shipped the second carload of grapes to the plaintiff, which were known as Emperor grapes, which were in first class condition when shipped, "and were good and merchantable and as agreed upon." The defendant then set forth that the plaintiff refused to accept this second carload of grapes, and they were sold by the railroad company for freight charges, before the defendant could have them re-routed. The defendant then made denial of the plaintiff's allegation as to loss of profits on this second car.

Upon the trial of this case, the second car of grapes referred to in the pleadings was apparently eliminated. The evidence refers to the second car of grapes only incidentally. The instructions submitted by the plaintiff and given by the court, as well as those submitted by the defendant, refer only to the car of grapes which was received by the plaintiff and which he claims were not of the quality contracted for and warranted by the defendant. The theory upon

(1)20 per ton; that the wrapes in this shipment were good and sound and that the defendant denied that they were green and unmerchantable. Further, the defendant stated in this affidavit of merits, that he had no knowledge of what the plaintiff said these wrapes for, and he demanded proof of this fact. He further alleged that after this car of wrapes was shipped, and before it arrived in Chicago, the wrape market fell off more than fifty per cent, which is the reason why the plaintiff received such a small amount for these wrapes. The defendant made further specific denials of various allegations made by the plaintiff in his declaration, and he then set forth that he shipped the second carload of wrapes to the plaintiff, which were known as "Superior wrapes, which were in first class condition when shipped, "and were good and merchantable and as agreed upon." The defendant then set forth that the plaintiff refused to accept this second carload of wrapes, and they were sold by the railroad company for freight charges, before the defendant could have them re-routed. The defendant then made denial of the plaintiff's allegation as to loss of profits on this second car.

Upon the trial of this case, the second car of wrapes referred to in the pleadings was apparently eliminated. The evidence relative to the second car of wrapes only incidentally. The instructions submitted by the plaintiff and given by the court, as well as those submitted by the defendant, refer only to the car of wrapes which was received by the plaintiff and which by claims were not of the quality contracted for and warranted by the defendant. The theory upon

which the plaintiff sued the defendant and recovered the judgment appealed from, was that of an alleged breach of contract and a breach of warranty as to the quality of grapes covered by that contract. The defendant's theory is that no contract of purchase and sale ever existed between him and the plaintiff, and that the proof shows that the only capacity in which the defendant acted in connection with the transaction covering this car of grapes, was that of an accommodating agent, without compensation, and that, therefore, the only possible liability that he might have incurred, by reason of the arrangement that existed between him and the plaintiff was one in tort, for gross negligence in discharging his duty to the plaintiff as such an agent. Hindman v. Borders, 89 Ill. 336. The plaintiff contends that this position of the defendant is an afterthought, as is demonstrated by parts of the affidavit of merits filed by the defendant in connection with his plea. Some parts of the defendant's affidavit of merits, considered by themselves, would tend to support that position of the plaintiff, while others are quite consistent with the position of the defendant, referred to above. On the whole, we are of the opinion, that the affidavit of merits is sufficiently broad to comprehend the defendant's position. Moreover, the defendant introduced testimony at the trial of the case specifically supporting this contention of his, all of which was admitted without any suggestion being made, on the part of the plaintiff, that it was a departure from the pleadings. The issue as to whether there was a contractual relationship between the parties, involving a purchase and sale with a warranty and a breach of that warranty, or whether the position occupied by the defendant

which the plaintiff sued the defendant and recovered the judgment appealed from, was that of an alleged breach of warranty and a breach of warranty as to the quality of grapes covered by that warranty. The defendant's theory is that no contract of warranty and data ever existed between him and the plaintiff, and that the only question in which the defendant asked in connection with the transaction covering this sale of grapes, was that of an commodating agent, without consideration, and that, therefore, the only pleadable liability that he might have incurred, by reason of the arrangement that existed between him and the plaintiff was one in tort, for gross negligence in [illegible] the trap to the plaintiff as soon as grapes. [illegible] v. [illegible], 54 N.Y. 152. The plaintiff asserts that his position at the trial was in no alternative, he is concerned by merit or the difficulty of merely that by the defendant is [illegible] the plea. Some proof of the defendant's efficient merit, manifested by [illegible], would seem to support that position of the plaintiff, while others may quite [illegible] with the position of the defendant, referred to above. [illegible], we are of the opinion, that the difficult or merits in [illegible] brought to comprehend the defendant's position. Moreover, the defendant introduced testimony at the Trial of the case specifically supporting his contention of his, all of which was [illegible] without any [illegible] being made, on the part of the plaintiff, that it was a departure from the pleadings. The issue as to whether there was a contractual relationship between the parties, involving a warranty and with a warranty and a breach of that warranty, or whether the position occupied by the defendant

was that of an accommodating agent, was squarely raised in the trial court both by the evidence and by the instructions given to the jury at the request of the respective parties, and therefore the defendant is entirely within his rights in urging the same issue in this court.

The plaintiff was an importer and commission merchant in the City of Chicago. The defendant was a wholesale grocer, living in Pittsburg, Pennsylvania. These two parties first met when they were in California in the fall of 1919, for the purpose of buying goods for their respective businesses. They were again in California in October, 1920, for the same purpose. The defendant had gone out in July of that year, as he testified, "for the purpose of buying grapes, raisins, tomatoes and a lot of other stuff." In October, the parties met at the St. Francis Hotel in San Francisco. It would seem from all the testimony in the record that this was a chance meeting. Both parties were then on the lookout for grapes. After they met in San Francisco, the defendant made a trip to Fresno, where he bought a car of grapes for himself, and then he returned to San Francisco. In the meantime, the plaintiff had not made any purchases. The defendant told the plaintiff he was going back to Pennsylvania, but the plaintiff asked him to go and buy some grapes with him, and about the middle of October the parties went to the vicinity of Fresno and Modesta, where they traveled about the country in an automobile, looking for grapes. They finally found a farmer who had some grapes to sell and he gave them a price of $67.00 a ton, with $5.00 for brokerage, making a total of $72.00 a ton.

was that of an accommodating agent, was squarely raised in the trial court both by the evidence and by the instructions given to the jury at the request of the respective parties, and therefore the defendant is entirely within his rights in urging the same issue in this court.

The plaintiff was an importer and commission merchant in the City of Spokane. The defendant was a wholesale grocer, living in Pittsburg, Pennsylvania. These two parties first met when they were in California in the fall of 1920, for the purpose of buying goods for their respective businesses. They were again in California in October, 1920, for the same purpose. The defendant had gone out in July of that year, as he testifies, "for the purpose of buying grapes, raisins, tomatoes and a lot of other stuff." In October, the parties met at the Palace Hotel in San Francisco. It would seem from all the testimony in the record that this was a chance meeting. Both parties were there on the lookout for grapes. After they met in San Francisco, the defendant made a trip to Fresno, where he bought a car of grapes for himself, and then returned to San Francisco. In the meantime, the plaintiff had not made any purchases. The defendant told the plaintiff he was going back to Pennsylvania, but the plaintiff asked him to go and buy some grapes with him, and about the middle of October the parties went to the vicinity of Fresno and Madera, where they traveled about the country in an automobile, looking for grapes. They finally found a farmer who had some grapes to sell and he gave them a price of $87.00 a ton, and $5.00 for insurance, making a total of $92.00 a ton.

It was necessary for the plaintiff to leave Fresno and go to San Jose on business. From the testimony of the plaintiff it would appear that the deal which he and the defendant made with the farmer, was just before the plaintiff left Fresno. From the defendant's testimony it would appear that this deal was made after the plaintiff left Fresno. This difference, however, is not of importance. The plaintiff testified that the defendant said he would remain in Fresno and put this deal with the farmer through, and send two cars of the grapes to the plaintiff and two cars to himself, the defendant; and that plaintiff, upon leaving Fresno, gave the defendant his check for $150.00 to be used on the purchase of the two cars of grapes that were to be shipped to the plaintiff; that the defendant was not to receive anything in connection with closing this deal, except such an amount as would cover his expenses.

The plaintiff further testified that after he reached San Jose and heard nothing from the defendant as to the outcome of their purchase from the farmer, he wrote the defendant and asked what had become of that transaction and that the latter replied that the farmers had backed out, but that he would look around for some other purchases; that the first time he talked with the defendant he told him that if he (the defendant) could get a couple of cars of "good sound muscats, I would take them," and the defendant said, "All right;" that the plaintiff told the defendant in that conversation that he would not pay more than $100.00 a ton. The plaintiff was asked whether he was con-

It was necessary for the plaintiff to leave Prague and go to Spa here on business. From the testimony of the plaintiff it would appear that the dogs which he and the defendant took with them, was just before the plaintiff left Prague. From the defendant's testimony it would appear that this dog was given the plaintiff left Prague. This difference, however, is not of importance. The plaintiff testified that the defendant said he knew where to find the dog and also the house through which he found the dog. The defendant was not in the habit of using the telephone, and the plaintiff testified that the defendant was not in Karlsbad, the defendant was that statement, such leaving Prague. Here the difference is also not of importance. It is used to the purchase of the two pairs of pigeon that was to be shipped to the plaintiff, that the defendant was not in a position to negotiate with dealers, this fact, proof of which seems to have been sufficiency.

The plaintiff further testified that after he received the dog and found nothing from the defendant as to the outcome of their purchase from the Baron, he wrote the defendant and asked what had become of that transaction and that the latter replied that the Baron had changed and, but that he would look around for some other pigeons; that the first time he talked with the defendant he told him that if he (the defendant) could get a couple of good pigeons, "I would take them," and the defendant said, "All right" that the plaintiff told the defendant in that conversation that he would not pay more than $100.00 a pair. The plaintiff was asked whether he was con-

cerned with how much the defendant paid for the grapes and he said he was not. Apparently, the plaintiff returned to Chicago about the first of November and the defendant remained in Fresno. The plaintiff introduced a telegram addressed to him in Chicago, under date of November 6, from the defendant, reading, "HAVE BUY GRAPES FOR YOU UNDER YOUR INSTRUCTIONS NOW YOU TRY TO GET AT LIST TWO CARS MUSCATEL COST YOU ONE HUNDRED FIVE WIRE BANK GUARANTEE TO BANK OF ITALY IMMEDIATELY WILL SHIP PROMPTLY." Plaintiff also introduced another telegram from the defendant dated two days later, reading, "HAVE TWO CARS MUSCATEL AT YOUR DISPOSITION WHICH I HAVE BOUGHT UNDER YOUR INSTRUCTION PRICE ONE HUNDRED FIVE WIRE BANK GUARANTEE TO HE BANK OF ITALY IMMEDIATELY GRAPES WILL BE SHIPPED TOMORROW." On the same day the plaintiff received this telegram from the defendant, November 8, 1920, he sent the defendant a telegram in reply, reading, "MY INSTRUCTIONS WERE ONE HUNDRED IF ACCEPTABLE WILL WIRE GUARANTEE." On the same day the plaintiff wrote the defendant a letter at Fresno, referring to the last telegram received from him, and to the telegram which the plaintiff had sent in reply, and in this letter the plaintiff said, "As far as I can remember, no instructions were given to you to secure grapes at $105.00, per ton, as I could buy in San Francisco market when I left as low as $90.00 and Tokay as low as $75.00 per ton, F.O.B. car, but I decided not to buy on account of the depressed market here. Nevertheless, if you canlet it go at $100.00 will help you out in disposing these two cars." On the following day, November 9, 1920, the plaintiff received a telegram from

agreed with him much the defendant paid for the coupon and he said he was not. Consequently, the plaintiff returned to Chicago about the third of November and the defendant remained in Toronto. The plaintiff introduced a telegram addressed to him in Chicago, under date of November 6, from the defendant, reading, "DATE NOT ENTERED FOR YOU DURING YOUR INCUMBENCY HERE BUT TO GET AT LEAST TWO CASES INSTEAD. WHY YOU ONE EVENING BUT VIEW BACK HERE BEFORE TO SEEK OF XMAS ENGAGEMENT WITH SOME PROMINENT." Plaintiff also introduced another telegram from the defendant dated two days later, reading, "WHEN YOU COME HOPEFULLY AT YOUR OPINION WHICH TERMS DOUBT WITH TO A INSTRUCTION FROM OUR MEETING WITH WITH HAS CHANGED TO BE BEST OF XMAS INSTEAD XMAS WEEK TIME IN PLEASED TORONTO." On the same day the plaintiff received this telegram from the defendant, November 8, 1900, in which the defendant a telegram in reply, reading, "MY INSTRUCTIONS WITH ONE MONTHS IS ACCEPTABLE WITH WITH CHANGE." On the same day the plaintiff wrote the defendant a letter at Toronto, referring to the last telegram received from him, and to the telegram which the plaintiff had sent in reply, and in this letter the plaintiff stated, "As far as I can remember, no instructions were given to you to secure groups at $100.00, nor too, as I would buy in Ban Francisco market when I left as low as $50.00 and Tokay as low as $75.00 per ton, c.i.f. San. and I decided not to buy on account of the depressed market here. Nevertheless, if you could it up at $100.00 will buy you out in disposing these two cars." On the following day, November 9, 1900, the plaintiff received a telegram from

the defendant apparently in reply to the plaintiff's telegram of November 8, in which the defendant said, "ACCEPT ONE HUNDRED PER TON WIRE BANK GUARANTEE BANK OF ITALY IMMEDIATELY BEST PRICE BLACK RAISIN IS TWENTY TWO HALF THE GRAPES THAT I WILL SHIP YOU IS GOOD AND SOUND." Upon receipt of this telegram the plaintiff went to his Chicago bank and arranged to have this bank communicate with the Bank of Italy in Fresno, guaranteeing that a sight draft with bill of lading, covering a shipment of grapes to be made by the defendant, would be paid on its arrival here in Chicago, as the plaintiff explained, so that the defendant, upon delivering the bill of lading to the bank at Fresno, could immediately get "the money in this transaction." When the car of grapes arrived in Chicago, the plaintiff took up the draft amounting to $1348.77, and got possession of the bill of lading. He also paid the freight amounting to $765.48. Apparently there was attached to the draft, both the bill of lading and a document referred to in the record as an invoice, reading as follows: "From J. Ossola, Fresno, California to Louis Caravetta, Chicago, Illinois, 1080 Log fresh grapes, net weight 28970 at $100.00 - - $1498.77, Less deposit $150.00 -- $1348.77." The sight draft was drawn on the plaintiff by the defendant. On cross-examination the plaintiff testified that when they were looking over grapes around Fresno, they succeeded in buying sixty tons which would make about four cars, "and we agreed to split them, making two cars apiece." These were the grapes involved in the deal with the farmer, which fell through. The plaintiff further testified that the defendant remained over at Fresno in order to load those four cars; that when the plain-

the defendant apparently is wrong to the plaintiff's
telegram of November 6, in which the defendant said,
"SORRY OUR MESSENGER DID YOU WRONG HAVE ORDERED BACK OF
THAT IMMEDIATELY NOW WHEN BLACK SALMON IS TOUGHT TWO.
SLOP THE DRIVER WHAT I TELL HIM NOT IS 4000 AND ROUGH."
Upon receipt of this telegram the plaintiff went to his
Chicago bank and arranged to have this bank communicate
with the Bank of Ibaly in Fresno, guaranteeing that a
sight draft with bill of lading, covering a shipment of
grapes to be made by the defendant, would be paid on its
arrival here in Chicago, as the plaintiff explained, so
that the defendant, upon delivering the bill of lading to
the bank at Fresno, could immediately get the money in this
transaction." When the car of grapes arrived in Chicago,
the plaintiff took up the draft according to Exhibit.77,
and got possession of the bill of lading. He also paid the
freight according to Exh.66. Apparently there was attached
to the draft, with the bill of lading and a document referred
to in the record as an invoice, reading as follows: "From
J. Canale, Fresno, California to Louis Cavaretta Chicago,
Illinois, 1000 lug fresh grapes, net weight 40000 at $800.00
- Exhibit.77, less deposit $150.00 - Exhibit.77." The night
draft was drawn on the plaintiff by the defendant. On cross-
examination the plaintiff testified that when they were loos-
ing away grapes around Fresno, they succeeded in buying sixty
tons which would make about four cars, "and we agreed to split
them, making two cars apiece." Those were the grapes involved
in the deal with the farmer, which fell through. The plaintiff
also further testified that the defendant remained over at
Fresno in order to load those four cars; that when the plain-

tiff left Fresno he gave the defendant a check for $150.00 to apply on that purchase of sixty tons from the farmer; that after the plaintiff reached San Jose, he wired back to the defendant at Fresno, "Buy as much as you can on field, market strong." The plaintiff was asked why he sent that wire to the defendant and he explained that when he left Fresno the defendant asked him to advise him how the market was going, "so I saw the market at San Francisco was high and I informed him that the market was strong." The plaintiff identified a letter which he wrote from San Francisco on October 20, to the defendant at Fresno, replying to a telegram which he had received from the defendant, in which the latter had advised him that he was unable to buy anything because the prices were changing from day to day. In this letter the plaintiff expressed surprise, referring to the fact that when he left Fresno, the deal with the farmers, based on a price of $72.00 a ton was allarranged for; and the plaintiff called the defendant's attention to the check for $150.00 which he had left with the defendant, to close up that deal, and he says he would like to know whether or not the defendant has "done anything with them. It is no use for me to come down there any more as it would only mean a loss of time and expenses, especially when there are no prospects for business. If at least you could buy two cars of muscat at $100.00 per ton, I would appreciate it very much; if not, please return my check and greatly oblige."

While the plaintiff was on the stand on cross-examination, his attention was called to his letter to the

ulff Jeff Brown the gave the defendant a check for $120.00 to apply on that purchase of sixty tons from the farmer; that after the plaintiff received the load, he wired back to the defendant at Fremont, "Ship as much as you can on field, market strong." The plaintiff was asked why he sent that wire to the defendant and he explained that when he left Fremont the defendant asked him to advise him how the market was going, "as I saw the market at San Francisco was high and I informed him that the market was strong." The plaintiff identified a letter which he wrote from San Francisco on October 22, to the defendant at Fremont, replying to a telegram which he had received from the defendant, in which the latter had advised him that he was unable to buy anything because the prices were changing from day to day. In this letter the plaintiff expressed surprise, referring to the fact that when he left Fremont, the deal with the farmers, based on a price of $70.00 a ton was disarranged for; and the plaintiff called the defendant's attention to the check for $120.00 which he had left with the defendant, to close up that deal, and he says he would like to know whether or not the defendant has "done anything with them. It is no use for me to come down there any more as it would only cost a loss of time and expense, especially when there are no prospects for business. If at least you could buy two cars of meats at $100.00 per ton, I would appreciate it very much; if not, please return my check and greatly oblige."

While the plaintiff was on the stand on cross-examination, his attention was called to his letter to the

defendant dated November 8, 1920, in which he stated that as far as he could remember, "no instructions were given to you to secure grapes at one hundred five dollars per ton," and also to his telegram of the same date in which he had wired the defendant "MY INSTRUCTIONS WERE ONE HUNDRED," and he was asked what the instructions were he referred to in that letter and telegram and he answered, "It was only in one of my letters I told him if he could send two cars of muscatels at one hundred dollars per ton," and that those were the only instructions he referred to in his telegram and letter of November 8. In this testimony, the plaintiff was very apparently referring to his letter of October 20, written from San Francisco to the defendant at Fresno, after he had apparently learned that the deal between the farmer, the defendant, and himself, had fallen through, in which letter it will be noted he says to the defendant, "If at least you could buy me two cars of muscats at $100.00 per ton, I would appreciate it very much; if not, please return my check and greatly oblige." The remainder of the plaintiff's testimony has to do with the condition of the car of grapes in controversy, upon their arrival at Chicago, and his disposition of the grapes. In the view we take of the case, it will not be necessary to refer to that testimony.

The defendant testified that he and the plaintiff had a talk before the latter left Fresno on October 14; that the plaintiff wanted to buy some grapes; that the parties had been out in the fields for a day or two looking for grapes but had not succeeded in getting any; that in their conversation of the fourteenth, the plaintiff said he had to go away for a few days but would be back,- "then he asked me if I

defendant dated December 8, 1959, in which he stated that, "as far as he could remember, 'no instructions were given to you to remove grapes at one hundred five dollars per ton,'" and also to his telegram of the same date in which he had stated the defendant "NO INSTRUCTIONS WERE GIVEN," and he was asked when the instructions were in relation to his letter and telegram and he answered, "It was only in the of my letters I told him it he could hold two cars of grapes at one hundred dollars per ton," and that these were the only instructions he referred to in his telegram and letter of November 8. In this testimony, the plaintiff was very apparently referring to his letter of October 30, written from San Francisco to the defendant at Fresno, after he had apparently learned that the deal between the farmer, the defendant, and himself, had fallen through. In which letter he will be noted he says to the defendant, "If we leave you paid by on two cars of grapes at $100.00 per ton, I would appreciate it very much; if not, please return my check and greatly oblige." The testimony of the plaintiff's testimony has to do with the conditions of lease of grapes in controversy, upon their arrival at Chicago, and his disposition of the grapes. In his view of the matter, it will not be necessary to refer to that testimony.

The defendant testifies that he and the plaintiff had a talk before the letter left Fresno on October 14; that the plaintiff wanted to buy some grapes; that the parties had been out in the fields for a day or two looking for grapes but had not succeeded in getting any; that he knew conversation of the farmers, the plaintiff said he had to pay $1.5 a ton days but would be back. Then he asked me if I

would buy some grapes for him. He said he didn't want to bother me but he was going to pay me; he hadn't succeeded in buying any grapes, and he said he would leave a few dollars there or whatever I could buy grapes with, buy two cars. I told him it was a hard proposition as he was there himself and he knew how hard it was to buy grapes. He insisted that I would go back and do thebest I can to secure at least two cars, Buy all I could." The defendant further testified that at that time they had promises for some grapes, from farmers in the field, but had not made a payment on them; that the farmers had told them to come back a few days later, but they didn't get any of those grapes, and up to the time the defendant had the conversation with the plaintiff, just referred to, they had not succeeded in making any purchases. He testified further that when the plaintiff left, he left a check for $150.00 with the defendant, to use in making a deposit if he succeeded in closing a purchase; that a few days after the plaintiff left Fresno, the defendant got a telegram, already referred to, reading, "BUY AS MUCH AS YOU CAN ON FIELD MARKET STRONG;" that later, the plaintiff called the defendant over the long distance telephone to find out if the defendant had succeeded in buying any grapes; that the defendant told him he had some promises but "couldn't give him any information. The only thing I could do was to get a promise from day to day;" that the plaintiff told him to try again, - "He encouraged me to buy grapes for him, and that he had been sick and one thing and another." The defendant then introduced a letter he received from the plaintiff, dated October 20, to which reference has already been made, and another letter dated at San

would say some people too him. He said he didn't want to
bother me but he was going to pay my he hadn't succeeded
in buying my property, and he will be really from a the million
dollars or whatever I will buy future film, for the site.
I hold the is was a best opportunity he is the that himself
has be then has been in not in my people. In instead that
I really go long and to further I am to always at least the
work, for all I could." The defendant further testified that
at that time they had previous for some people, from farmers
in the field, but had not made a payment on them; that the
farmers had told them to come back a few days later, but they
didn't pay any of them payment, and go to the time the defend-
ant had an conversation with the plaintiff, that refused to
they had not succeeded in making any purchases. He testified
further that when the plaintiff left, he left a check for
$[illegible] with the defendant, he was in making a deposit if he
succeeded in closing a purchase; that a few days after the
plaintiff left Fresno, the defendant got a telegram, already
addressed to, reading, "Not as good as you did on first market
[illegible]." That later, the plaintiff called the defendant over
the long distance telephone to find out if the defendant had
succeeded in buying any property; that the defendant told him
he had some properties but "couldn't give him any information.
The only thing I could do was to get a promise from day to day;
that the plaintiff told him to try again." The encouraged so
to buy pecans the time, and that he had been sick and was trying
and hurried." The defendant then introduced a letter he re-
ceived from the plaintiff, dated October 30, to which refer-
ence has already been made, and another letter dated at San

Francisco, October 25, in which the plaintiff says: "Very sorry that the two farmers backed out after I left and advise that henceforth it will pay us to deal with a better class of people in order to meet our obligations. I trust that the 40 tons of which you stated the price was $72.00 will be an accomplished fact and that you have already started to pick and load and whatever the expense may be this will be equally divided between us. I am encountering hardship in loading the few cars around Gilroy and I believe I will get through by Wednesday. If anything is to be done there wire me and I will be there the following day if I can. Trusting that you will be able to get at least two cars for me, and with regards, I am, Very truly yours."

The defendant's attention was called to his telegram of November 6, to the plaintiff in which he said that he had bought grapes "for you under your instructions and he was asked what instruction he referred to, and he answered, "Why, he insisted for me to buy grapes, but he never came back and later on, on the 18th or 20th, I bought the grapes, when he insisted. * * * I wrote him a couple of letters, explaining I couldn't buy grapes, but he insisted that I buy grapes, he write back and he want me to buy muscatels." He further explained that the instructions he referred to were given by the plaintiff, "to buy two cars of grapes, and he left a check for one hundred fifty dollars to buy grapes with," and that in the conversation had at Fresno before the plaintiff left, both Emperor and Muscatel grapes were referred to, and the plaintiff said to get Emperor or Muscatel.

Transcript, October 26, in which the plaintiff says: "Tony says that the two dummies backed out after I left and advise that bondsmen it will pay us to deal with a bunch of people in order to meet our obligations. I trust that the 44 tons it which you stacked the price was OK. It will be an account taken that and that you have already charged to pick and load and whatever the expense may be this will be equally divided between us. I am commencing breaking in loading the 1ce duty around Sidney and I believe I will get through by Saturday. If anything is to be done please wire me and I will be there the following day if I can. Trusting that you will be able to get as large a bond from Jim Joe, and with regards, I am, Very truly yours."

The defendant's attention was called to this letter of November 6, by the plaintiff in which he said that he had bought pepper "for you under your instructions and he was asked why instructions in writing by you to purchase pepper. "Why, he insisted for me to buy pepper, but he never came back and later on, on the 12th or 13th, I bought the pepper, then he insisted. * * * I wrote him a sample of letter, explaining I couldn't buy pepper, but he insisted that I buy pepper. He wrote back and he wants me to buy more pepper." He further explained that the instructions he referred to were given by the plaintiff, "to buy two car of pepper, and in lieu a check for one hundred (1,00) dollars to buy pepper with," and that in the conversation had at Fresno before the plaintiff left, both Hopper and Hammond were interested by the plaintiff said to get Hopper to assist.

The defendant further testified that after the plaintiff wired him, he went to the California Packing Company and bought some lugs; that after the farmers failed to make good on their sale, the defendant conferred with a broker named Foley, who was in contact with the California Packing Company, and through Foley he purchased four or five cars of Muscatel grapes, in part payment for which, he turned over the lugs he had purchased in connection with the prior grape deal which fell through; that the price Foley made him on these Muscatel grapes was $105.00 a ton, which was the offer he referred to in his telegrams to the plaintiff, dated November 6th and 8th. The defendant then testified regarding his receipt of the plaintiff's telegram of November 8, in which he said, "MY INSTRUCTIONS WERE ONE HUNDRED" and defendant's reply thereto, of November 8, reading, "ACCEPT ONE HUNDRED PER TON * * *;" and he then testified that the shipment of grapes here in question was purchased by him from the broker; that after he got the telegram from the plaintiff, referring to the fact that the plaintiff's instructions were $100.00, he returned to the broker and told him that $100.00 was all he could pay and that "the broker said he would sacrifice his commission and let them go at one hundred so I wired him 'Accept'."

The defendant further testified that they started to load these grapes on November 4, that he sent a telegram on that date, and it came back, so he sent another on the 6th, "but one of the muscatel cars in the meantime was sold," so he secured another car of Emperor grapes and shipped these two cars to the plaintiff. The defendant was asked what he did

The defendant further testified that after the plaintiff wined him, he went to the California Packing Company and bought some lugs; that after the farmers failed to make good on their sale, the defendant contracted with a farmer named Foley, who was in contract with the California Packing Company, and through Foley he purchased fruit or fruit [illegible] of farmers growers, [illegible] he turned over the lugs he had purchased in connection with the pulp grape deal which fell through; that the price Foley made him on those imported grapes was $[illegible].00 a ton, which was the price he returned to in his telegrams to the plaintiff.

Under Cross-examination the defendant then [illegible] regarding his receipt of the plaintiff's telegram of December 8, in which he wrote, "MY INSTRUCTIONS WERE ONE CARLOAD" and plaintiff's reply thereto, of December [illegible], reading, "SORRY ONE CARLOAD ARE TOO [illegible]" and he then testified that the [illegible] grapes from Tuscumbia was purchased by him from the brokers; that after he got the telegram from the plaintiff, referring to the fact that the plaintiff's instructions were $[illegible].00, he returned to the broker and told him that $[illegible].00 was all he would pay and that "the broker said he would reconsider his commission and let them go at the Hundred as I wired him 'Leaves'."

The defendant further testified that they received a last plum [illegible] on December [illegible], and he sent a telegram on that date, and it came back, so he sent another on the 28th, "that one of the unsorted cars in the consignment was sold," so he received another car of Superior plums and shipped them too, sent to the plaintiff. The defendant was asked what he did

with the other cars he purchased from the broker and he said he shipped them to Pittsburg.

On cross-examination the defendant testified that when he bought the two cars of grapes, for the account of the plaintiff, he deposited the plaintiff's check in part payment, and paid some cash; that he had paid for the lugs he had bought, and he turned over some of these for the grapes; that some of the money he advanced for the grapes was his and some of it was the plaintiff's ; that he had $150.00 of the plaintiff's money, which was part of the money he advanced on the grapes, and that he waited for the plaintiff's guarantee before completing the payment on the grapes; that the plaintiff had said he would be back in Fresno, but he didn't come back and the defendant couldn't get anything certain from him, and the grapes were ready to load, so he turned over some cash and some lugs to the broker. The defendant explained that he and the plaintiff "had put in the same amountofo buy lugs * * * we were buying together." The defendant was asked what he was getting out of buying the grapes and he answered, "Nothing. Not a thing. I didn't want to make any profit." He was then asked, "Were you to make anything out of the grapes?" and he answered, "No." He testified that he had not paid for the grapes when he wired the plaintiff on November 6, but he paid for them when the plaintiff sent his guarantee to the Bank of Italy at Fresno; that the defendant went to the Bank of Italy and got the amount of the draft from the Bank, covering the car in controversy, before it was shipped. The de-

with the other case be produced from the broker and he said he shipped them to Pittsburg.

On cross-examination the defendant testified that when he bought the two cars of grapes, for the account of the plaintiff, he deposited the plaintiff's check in part payment, but paid some cash; that he had paid for the trips he had bought, and he turned over some of those for the money; that some of the money he advanced for the grapes was his and some of it was the plaintiff's; that he had $180.00 of the plaintiff's money, which was part of the money he advanced on the grapes, and that he waited for the plaintiff's payments before completing the payment on the grapes; that the plaintiff had said he would be back in Tucson, but he didn't come back and the defendant couldn't get anything certain from him, and the grapes were ready to load, so he turned over some cash and some logs to the broker. The defendant explained that he and the plaintiff "had put in the same something for logs" "I we were buying logs-". The defendant was asked what he was getting out of buying the grapes and he answered, "Nothing. Not a thing. I didn't want to make any profit." He was then asked, "Were you to make anything out of the grapes?" and he answered, "No." The testimony that he had not paid for the logs when he wired the plaintiff on November 8, but he paid for them when the plaintiff had his guarantee to the bank of Italy at Fresno; that the defendant went to the bank of Italy and got the amount of the draft from the bank, notwithstanding the not in controversy, before it was delivered. The de-

fendant was asked whether he was the shipper of this car of grapes and he said he was not. He was then asked, "Who was the shipper?" and he answered, "The broker." He then admitted that when the car left Fresno, he, the defendant, had the bill of lading and in that sense, he could be considered the shipper, and that he turned the bill of lading over, with the draft, to the Bank of Fresno, when he got the money to pay for the grapes.

The only testimony in the record bearing upon the relationship between the parties, in connection with this transaction covering the car of grapes in question, was that given by the two parties interested. We have recited that testimony rather fully, because we areof the opinion that it clearly leads to a conclusion opposite to that which is represented by the verdict and judgment appealed from. We are of the opinion that theplaintiff's own testimony demonstrates that these parties never entered into any contract, whereby the plaintiff agreed to buy and the defendant agreed to sell, these grapes, and this status of the parties was also made out by the defendant's testimony. It is quite clear that these two parties, one a merchant from Chicago and the other a merchant from Pittsburg, were in California for the same purpose, namely, to buy goods in connection with the conduct of their respective businesses. They met at San Francisco and the plaintiff persuaded the defendant to go down to the neighborhood of Fresno and attempt to make some purchases of grapes. After this the plaintiff had to leave. A prospective purchase was then either definitely closed or was about to be and the plaintiff left $150.00 with the defendant in connection with that transaction.

Trenkmann was asked whether he was the shipper of this car of grapes and he said he was not. He was then asked, "Who was the shipper?" and he answered, "The broker." He then admitted that when the car left Fresno, he, the defendant, had the bill of lading and in that manner, he could be considered the shipper, and that he turned the bill of lading over, with the draft, to the Bank of Fresno, when he got the money to pay for the grapes.

The only testimony in the record bearing upon the relationship between the parties, in connection with this transaction covering the car of grapes in question, was that given by the two parties interested. We have read that testimony rather fully, because we crave the opinion that it clearly leads to a conclusion opposite to that which is presented by the verdict and judgment appealed from. We are of the opinion that the plaintiff's own testimony demonstrates that these parties never entered into any contract, whereby the plaintiff agreed to buy and the defendant agreed to sell, these grapes, and this chasm of the parties was also made out by the defendant's testimony. It is quite clear that these two parties, one a merchant from Chicago and the other a merchant from Fresno, were in fact strangers for the same purpose, namely, to buy goods in connection with the conduct of their respective businesses. They met at San Francisco and the plaintiff persuaded the defendant to go down to the neighborhood of Fresno and attempt to make some purchases of grapes. After this the plaintiff had to leave. A prospective purchaser was then either definitely chosen or was about to be and the plaintiff left Chicago with the defendant in connection with that transaction.

After the plaintiff left and discovered that the grape market was strong, at San Francisco, he wired back to the defendant to buy all he could. Then the plaintiff learned that the deal which was pending when he left, which involved the purchase of four cars of grapes, two of which were for him and two for the defendant, had fallen through, and on October 20, he wrote the defendant expressing his regret at the outcome of that deal and added, "If at least you could buy two cars of muscat at one hundred per ton, I would appreciate it very much; if not, please return my check and greatly oblige." That request of the plaintiff's contained in that letter, formed the entire basis of the defendant's subsequent efforts in the interest of the plaintiff and of his final purchase of the car of grapes in question, which was shipped to the plaintiff by the defendant. In thus accommodating the plaintiff at the latter's request, the defendant was acting purely as theplaintiff's accommodating agent. In our opinion, thereis no testimony showing or tending to show that the defendant obligated himself, by contract, to buy these grapes, nor did he make the warranty as alleged by the plaintiff in his declaration. After the defendant made his deal with the broker, Foley, he wired the plaintiff that he had the grapes and was ready to ship them, and asked the plaintiff to wire his guarantee, so that he could get the balance of the money to pay for them, and in this connection, he represented to the plaintiff that the grapes he had to ship "were good and sound." The plaintiff contends that the grapes he received were two-thirds green and unfit for use; that he had them under contract of saleto another, who was going to use them in making

grape juice or wine, and that to be suitable for that purpose it was necessary for them to be ripe and contain a large amount of sugar. The evidence in the record shows that there are two pickings of grapes of this character in California; and theevidence is uncontradicted that when these parties were endeavoring to buy grapes about Fresno, the second picking was on. The uncontradicted evidence shows further that in the second picking there is a larger percentage of green grapes than is to be found in the first picking. Further, the evidence is to the effect that grapes of this character, containing some percentage of green grapes, are suitable for making grape juice or wine; that if sweet wine is wanted, few green grapes, if any, can be used, but that if it is desired to make wine which is a little sour, it is customary to use some percentage of green grapes. The defendant submitted evidence tending to show that a car of muscatel grapes, one third green, would be considered as a fulfillment of an order of good, sound Muscatel grapes of the second clipping or picking. The plaintiff introduced the testimony of several witnesses who examined this car and sorted out the grapes. These witnesses gave varying opinions as to the proportion of green grapes in the car. These opinions ranged from some witnesses who said the grapes were two-thirds green to others who gave it as their opinion that the car was one-third green.

In our opinion, the plaintiff's case as alleged in his declaration, to the effect that the defendant had obligated himself, by contract, to sell him this car of grapes, and had given a warranty in connection with the sale, is not

grey fabric or white, and that to be suitable for that purpose it must be necessary for him to be able not merely a large amount of caper. The evidence in the record shows that when the painting of copies of this character is attempted, the flesh-tones in monochrome has some blue paling when contrasting, to the eyes than green, the models viewing the one. The counterfeiter relinquishes green tints because the second viewing there is a larger percentage of green than he is to found in the first viewing. Further, the evidence is to the effect that copies of this character, containing some percentage of green paper, are suitable for making green paper or other, that if green also is wanted, the green pigment, if any, can be added, but that if it is desired to make the white in a light tone, it is necessary to use some percentage of green pigment. The defendant admitted making or have had a use of material which, when green, would be considered as a fulfillment of the color of green, found essential paper of the genuine currency by printing. The plaintiff introduced the testimony of certain witnesses who stated that we had seen the green. These witnesses gave varying opinions as to the percentage of green paper in the note. Those witnesses judged from some distance the note the paper with considerable force to which the jury is as much more reliable than the one who examined the note.

In our opinion, the plaintiffs case is clearly in the defendant, in the notice and the criminal and intention but likewise, in fact, the court of appeals has not given a reasonable interpretation of the note, is not

made out by the proof, and the trial court erred in denying the defendant's motion, submitted at the close of all the evidence, instructing the jury to find the issues for the defendant.

For the reasons stated, the judgment of the Superior Court is reversed.

JUDGMENT REVERSED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

[illegible] was by the [illegible], and the first [illegible] event is [illegible] the [illegible] [illegible], [illegible] in the [illegible] of all the [illegible], [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

For the [illegible] [illegible], the [illegible] of the [illegible] [illegible] [illegible] [illegible].

[illegible]

[illegible], [illegible] [illegible], [illegible] [illegible].

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| B. L. ROSE, Appellee, v. ALLEN JOHNSON, et al, Appellants. | 236 I.A. 635<br>INTERLOCUTORY APPEAL<br>FROM CIRCUIT COURT,<br>COOK COUNTY. |

Opinion filed December 24, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants seek to reverse an interlocutory restraining order, entered in the Circuit Court of Cook County, July 14, 1924, by which said defendants and all persons acting through or under them were restrained "from in any manner interfering with the complainant from officiating as pastor of the Salem Baptist Church, as prayed for in the bill of complaint, until the further order of this court." The complainant Rose filed his bill of complaint on June 18, 1924, against the defendants Johnson, Enders, Naughn and Crawford, who were trustees of the Salem Baptist Church, and also one Branch, who was purporting to act as the pastor of the church. The complainant alleged in his bill that he had been duly elected as pastor of the Salem Baptist Church by a majority of its members, in October, 1922, in conformity with the customs and laws of the church, which pastorate was to continue until terminated by resignation or removal by a majority vote of the members, at a meeting duly called for that purpose; and at the same time he was voted a salary of $35.00 per week, as such pastor; that he thereupon entered

upon his duties as pastor and continued to officiate as such, and received his salary until sometime in January 1923, when he was wrongfully prevented from acting as pastor of the church and from receiving his salary as such, by reason of the acts of the defendants complained of; that he had never been legally removed as pastor of the church, and was the only legally qualified pastor and was entitled to officiate as such and receive his salary. Complainant further alleged that sometime in January, 1923, the defendants Johnson, Enders, Maughm, and Crawford, filed a bill in the Circuit Court of Cook County, seeking to restrain him, the complainant in the suit at bar, from acting as pastor of the Salem Baptist Church alleging that he had been removed as such by vote of the members of the church, at a meeting held on January,5, 1923, and that on that bill the court entered a restraining order as prayed; that thereafter this complainant, as defendant in the prior proceeding, filed his answer denying the allegations of the bill and alleging that the complainants in that action had been removed as trustees of the church; that on the issues thus joined, the matter was referred to a special commissioner, who took testimony and filed a report to the effect that the defendant there (complainant here) had never been lawfully removed as pastor of the church, nor had the complainants in that action been removed as trustees; that this report of the commissioner was confirmed in that action and the cause continued for the taking of an accounting; that thereafter, in February, 1924, the court entered an order directing both complainants and defendant in that proceeding

to refrain from holding any election, either involving the pastor or the trustees, within ninety days; that the complainant in the suit at bar (defendant in the prior action) complied with that order, but that the complainants in that action, in violation of such order, took possession of the church building and refused the complainant in the suit at bar any opportunity to preach in the church or officiate as its pastor, and refused to allow the followers of the complainant in the suit at bar, who he alleges constitute a majority of the said church, to enter the same or have any part in the meetings of the church. The complainant further alleged in the bill filed in the suit at bar, that "since the time of the dissolution of the injunction issued against him," he had at various times, in compliance with the findings of the court and his rights as pastor of the church, attempted to enter the church building for the purpose of conducting services, and that a large number of the members of the church, friendly to the complainant, had attempted to enter for the purpose of taking part in such services, but on all such occasions they had been prevented from entering the church and on several occasions had been forcibly ejected therefrom by the defendants. It was further alleged that in May 1924, the month prior to the time the suit at bar was instituted, the prior proceedings brought by the defendants in the suit at bar, which have been referred to above were dismissed, on their motion, since which time said defendants had continued to hold possession of the church and exclude this complainant

therefrom; that the defendant Branch had on several occasions since the dismissal of the bill of complaint in the prior suit, officiated as pastor of the church, in disregard of the complainant's rights as pastor of the church, although said Branch had never been elected as pastor and the complainant had never been removed as such.

On June 17, 1924, the defendants Johnson, Enders and Crawford filed sworn answers to the bill of complaint, denying all the material allegations of the bill. These answers are very voluminous. They are to the effect that the meeting at which the complainant claimed to have been elected pastor of the Salem Baptist Church was not attended by a majority of the members of the church, and he was never elected therefore according to the rules, customs and laws of the church, and was therefore never entitled to act as its pastor. The answers admit that the complainant was paid thirty-five dollars per week by the church "for preaching" from October 1922 to January 1923. Although the answers denied that the complainant was ever elected pastor of the church, they alleged that in January, 1923, the church held a meeting at which a majority of the members voted, to request the complainant "to resign as pastor of the said church." The answers alleged that the complainant has never been entitled to act as pastor of the church since January, 1923. As to the prior litigation instituted in the Circuit Court, by certain of the defendants in the suit at bar, the answers filed herein allege that the

[illegible], that the defendant Brown had an interest, because since the dismissal of the bill of complaint in the probate court, affiliated as pastor of the church, in disregard of the complainant's rights as member of the church, although said Brown had never been elected as pastor and the complainant had never been removed as such.

On June 17, 1904, the defendants Johnson, Jackson and Crawford filed answers to the bill of complaint, denying all the material allegations of the bill. These answers are very voluminous. They are to the effect that the meeting, at which the complainant claimed to have been elected pastor of the Salem Baptist Church was not attended by a majority of the members of the church, and he was never elected therefore lawfully to the office, because the time of the church, and was therefore never entitled to act as its pastor. The answers admit that the complainant was paid thirty-five dollars per week by the church "for preaching" from October 1903 to January 1904. Although the answers denied that the complainant was ever elected pastor of the church, they alleged that in January, 1903, the church had a meeting at which a majority of the members voted, by request the complainant "to resign as pastor of the said church." The answers alleged that the complainant has never been entitled to act as pastor of the church since January, 1903. As to the prior litigation instituted in the Circuit Court, by virtue of the determination in such as has, the answers filed herein allege that the

report of the commissioner appointed in that suit, as to the action taken by the members of the church at the meeting of January 5, 1923, was to the effect that neither the claim of the complainant here, to the effect that the resolution asking him to resign had been voted down, nor the claim of the defendants here, to the effect that it had been adopted, had been sustained by the proof, but that no legal or proper vote had been taken on the resolution, owing to the confusion at the meeting and the controversy which arose on the question of the right of the complainant Rose to preside over that meeting. The answers further admit that the prior proceedings were dismissed on April 4, 1924, and they allege that the evening of that day was the regular time for the monthly meeting of the members of the church, and that the members did meet on that evening and at that meeting a resolution was adopted, discharging the complainant Rose, as pastor of the church, and that written notice of this action was served on him the following day; and further, that at that meeting of April 4, a majority of the members present adopted a motion engaging the defendant Branch as the pastor of the church. The answers further set forth that on April 7, on motion of the complainant Rose, the defendant in the prior proceedings in which the bill had been dismissed on April 4, the order of dismissal in that case was vacated and the motion to dismiss was continued, and that thereafter, on May 19, 1924, the motion for dismissal again came up and at that time the defendants denied committing acts in violation of the order entered on February 18, 1924, in the prior proceedings; that the bill in that

support of the constitutional amendment in that vote, so in the motion taken by the members of the church at the meeting of January 8, 1888, was to the effect that neither the claim of the complainant here, to the effect that she violated the constitution here, nor the claim of the defendants here, to the effect that it had been complied, had been evaluated by the proof. But that no legal or proper vote had been taken on the resolution, owing to the confusion at the meeting and the misstatement with regard to the question of the right of the complainant then to preside over that meeting. The Supreme Court then stated that the only ground upon which judgment on June 4, 1888, did not stand was that the trustee of that day was the trustee who for the monthly meeting of the members of the church, and that the members did meet on that evening and at that meeting a resolution was adopted, disbanding the complainant and those, in number of the church, and that written notice of this action was served on him the following day and further, that at that meeting of April 4, a majority of the members present adopted a motion changing the distribution based on the number of the church. The answers further set forth that on April 7, on motion of the complainant here, the difficult in the probate proceeding in which the bill had been dismissed on April 4, the order of dismissal in that case was vacated and the motion to dismiss was overruled, and that thereafter, on May 27, 1888, the motion for dismissal again came on and at that time the defendants filed answering pleas in abatement of the order vacated on February 27, 1888, in the probate court, that the bill in that

case was then dismissed , the court retaining jurisdiction to pass on certain pending questions of contempt. They admitted they held possession of the keys of the church and that they were in their possession, together with the other members of the trustees of the church, as such trustees. The answers contain some further allegations which need not be set forth here. The substance of the material allegations of the answers are as above stated.

On the same day these sworn answers were filed by the three defendants named, the defendant Branch filed a general and special demurrer to the bill, as did also the remaining defendant Maughn.

On July 9, 1924, the defendants made a motion, before the chancellor who had theretofore heard arguments in support of the demurrers, and also in support of the complainant's motion for a temporary restraining order,asking for a change of venue. This motion was continued to July 14, and on that day the motion was denied and thirty days were allowed.for the bill of exceptions.

On the same day, July 14, 1924, the chancellor entered an order overruling the demurrers which had been filed, to the bill of complaint, by the defendants Maughn and Branch, and they elected to stand by their demurrers. Also, on the same day, the chancellor entered a temporary restraining order, to reverse which, the defendants have perfected this appeal.

In the brief filed by solicitors for the defendants, contentions are made to the effect that the chancellor

[illegible] dismissed. The county retaining jurisdiction to pass on certain pending questions of testimony. They authorized they held possession of the keys of the church and that they were in their possession. Neither did or the other members of the Council of the church, as such trustees, the answers contain some far-fetched allegations which need not be set forth here. The substance of the material allegations of the answers are as above stated.

In the most day these same answers were filed by the three defendants named, the defendant Lemons filed a general and special demurrer to the bill, as did also the remaining defendant Pegues.

On July 9, 1956, the defendants made a motion, before the chancellor who had theretofore heard arguments in support of the demurrers, and also in support of the complainants's motion for a temporary injunction restraining the change of venue. This motion was continued to July 14, and on that day the motions was denied and thereby were also allowed the bill of exceptions.

On the same day, July 14, 1956, the chancellor entered an order overruling the demurrers which had been filed, to the bill of complaint, by the defendants Hughes and Pegues, and they elected to plead by their answers. Also, on the same day, the chancellor entered a temporary restraining order, to remove a clerk, the defendants here resisting this remedy.

In the brief filed by appellees for the defendants, contention has been made to the effect that the chancellor

erred in sustaining the demurrers and denying the motion for a change of venue. Neither of these matters can be considered on this interlocutory appeal, as they are not the proper subject of such an appeal, nor was the appeal taken from those orders. As to the propriety of the action of the chancellor, in entering the temporary restraining order appealed from, we are of the opinion that this court ought not to disturb that action. It is true as the defendants contend in support of their appeal, that civil courts will not review the decisions of church organizations or other religious bodies, upon ecclesiastical matters or other similar questions exclusively within the control of such bodies, although they will interfere with church or other religious organizations, when rights of property or civil rights are involved. Chase v. Cheney, 58 Ill. 509. The suit at bar is not one involving the Salem Baptist Church, but is brought by the complainant, who claims to be the duly elected pastor of that church, against certain individuals who are alleged to be improperly interfering with the exercise of the plaintiff's rights as such pastor. One of the rights thus alleged by the complainant to have been interferred with by the defendants, is his right to receive the salary which he alleges has been duly voted him by the church. This is a property right in the office occupied by the plaintiff, which a court of equity will recognize and protect. Schweiker, et al v. Hunger, et al, 146 Ill. 369, 436. The defendants attempt to distinguish the Schweiker case from the suit at bar. In our opinion that case is applicable to the situation presented in the suit at bar.

stand in constituting the demurrers and denying the motions for a change of venue. Neither of those motions can be sustained on this interlocutory appeal, as they are not the proper subject of such an appeal, nor was the appeal taken from those orders. As to the propriety of the action of the chancellor, in sustaining the temporary restraining order appealed from, we are of the opinion that this court ought not to disturb that action. It is true as the defendants contend in support of their appeal, that civil courts will not review the decisions of church organizations or other religious bodies, upon constitutional matters or other similar questions exclusively within the control of such bodies, although they will interfere with church or other religious organizations, when rights of property or civil rights are involved. Green v. Green, 38 Ill., 466. The suit at bar is not one involving the Salem Baptist Church, but is brought by the complainant, who claims to be the duly elected pastor of that church, against certain individuals who are alleged to be improperly interfering with the exercise of the plaintiff's rights as such pastor. One of the rights thus alleged by the complainant to have been interfered with by the defendants, is his right to vacate the pulpit which he alleges has been duly voted him by the church. This is a property right in the office possessed by the plaintiff, which courts of equity will recognize and protect. Chandler, et al v. Bunnell, et al, 140 Ill. 569, 576. The defendants attempt to distinguish the cases from this court at bar. In our opinion that case is applicable to the situation presented in the suit at bar.

When the chancellor heard the motion of the complainant for a temporary restraining order, the complainant's sworn bill and also the sworn answers filed by three of the defendants were on file and before the court. It appears from the record that the chancellor heard no evidence in support of the motion nor were any affidavits presented by either of the parties, beyond the sworn pleadings. In that state of the record we are of the opinion that this court is not in a position to say that the chancellor committed any abuse of his discretion in entering the temporary restraining order appealed from. High in his work on Injunctions, 4th Ed. Sec. 1698, says that "courts of review or appellate jurisdiction interfere with extreme reluctance with the action of the inferior court" in such situations as the one presented here. This author further says: "Treating the power of granting interlocutory injunctions as resting in a sound judicial discretion, the courts of appellate jurisdiction are averse to any interference with the exercise of that discretion. And to such an extent is this aversion manifest, that it may be stated as a general rule in states where appeals are allowed from orders granting or refusing injunctions <u>in limine</u>, that the appellate or revisory court will not interfere with or control the action of the court below in such matters unless it has been guilty of a clear abuse of that discretion; and by abuse of discretion within the meaning of the law is meant an error in law committed by the court. * * * Where the action of the lower court in granting or refusing a preliminary injunction was based upon conflicting affidavits for and against the motion, such action will

not be disturbed upon appeal unless it appears upon the facts found that the writ was improvidantly granted."

The author referredtto points out further, in section 1591a, that upon a motion for an interlocutory injunction, made after answer filed, the denials of the answer are to be given no more weight than the allegations of the bill which they deny, citing Webb v. King, 31 Appeal Cases, Dist. of Columbia, 141. In that case the appellants, seeking to reverse a temporary restraining order, urged that although the complainant had made certain allegations in her bill, under oath, yet the answers made denial of these allegations, and alleged certain other failures by her, under oath. After noting this fact, the court says: "It does not follow from this fact that an injunction pendente lite, should not issue. The argument for the appellant proceeds upon the theory that the motion for an injunction pendente lite should be determined as though the hearing were upon bill and answer." The court held this was an erroneous assumption pointing out that although it was proper that the statements of an answer responsive to a bill of complaint and contravening its allegations, should be considered and given due weight, on motion for a temporary injunction, yet it did not follow that at the hearing of such motion the answer, "which at this stage of the case cannot be regarded as much more than an affidavit, should be allowed to overcome the sworn statements of the bill of complaint. The application is one addressed to the discretion of the court; and the purpose then is not so much to determine rights as to preserve the existing

status until the rights of the parties can be definitely determined, if there is reason to believe that a change of such status would injuriously affect the rights of the complainant. * * * Upon this hearing the sworn statements of the answer are entitled to no greater weight than the sworn statements of the bill of complaint; and it is within the sound discretion of the court to grant or withhold the injunction."

We are unable to say from the record presented here, that the trial court committed any abuse of discretion in entering the temporary restraining order appealed from, and it will therefore be affirmed.

ORDER AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

- 29540

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| B. L. ROSE, Appellee, v. ALLEN JOHNSON, et al, Appellants. | 236 I.A. 635<br>INTERLOCUTORY APPEAL FROM CIRCUIT COURT, COOK COUNTY. |

Opinion filed December 24, 1924.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants seek to reverse an order entered in the Circuit Court of Cook County on July 29, 1924, on motion of solicitors for the complainant Rose, which order recited that it appeared to the court from a petition filed therein by Rose, and from evidence heard in open court, that the defendants Johnson and others, trustees of the Salem Baptist Church, had possession of the keys to said church, and on demand of the complainant for said keys, disclaimed having them and denied having any knowledge as to where they could be found; and that it further appeared that said church was locked and had been fastened up so that the complainant and members of the church were unable to obtain access to the church, for the purpose of holding meetings and religious services. The order then granted leave to the said complainant Rose and said members of the said church "to use such means as may be necessary in opening said church, by changing locks or whatever may be necessary

in the premises, without in any way injuring said church building; and hereby directs that same may be done under the supervision of the Sheriff's Office of Cook County or the Police Department of the City of Chicago, and that the members of said church as well as complainant may be granted full and unrestricted access to said church, for the purpose of holding church services as aforesaid."

The interlocutory appeal in the suit at bar has been consolidated for hearing, in this court, with the interlocutory appeal perfected by the same defendants in the same case, being case No. 29429, in this court. We are this day filing an opinion in that interlocutory appeal and in that opinion the substance of the pleadings and the facts involved have been fully set forth, and it will not be necessary to repeat them here.

As to the interlocutory appeal involved here, it is sufficient to say that the order appealed from is not an appealable order. To be the subject of an interlocutory appeal, the order must come within the provisions of section 123 of the Practice Act, Cahill's Ill. Revised Sts. 1923, ch. 110, par. 132, which includes an order "granting an injunction or overruling a motion to dissolve the same or enlarging the scope of an injunction order or appointing a receiver or giving other or further powers or property to a receiver already appointed." The order appealed from in the suit at bar was none of these. It did not enlarge the scope of the temporary restraining order which had been entered by the chancellor on July 14, 1924, but was apparently entered for the purpose of making that temporary restraining order

In the meantime, without it was any relaxing evil should building and further stands that some may be been under the supervisions of the Chemist's Office of Good Hounds or the Police Department of the City of Oakland, and that the leaders of well known as well as unfriendly may be provided full and unwarranted reasons to make charges, for the purpose of holding chemist services no elements.*

The laboratory equal in the will or has has been established for benefit. In this county, with the laboratory equal workers so not and determine in the same work, using same on. Only on this work. In any this day filing or making in not laboratory equal and in that working the existence or one checking and the been involved work have fully not fully, and it will not be necessary to repeat this here.

As to the laboratory equal involves here, it is sufficient to say that the work equals from is not to appearance alone. To be the subject of my laboratory equal, the order also was with the questions of matter life or the treatment are, that's it, reason the time, on, file, our, 1?1, with involve an among "reading on injunction or examining a matter to benefit in work or analyzing the same of an injunction order or complaint a problem or during other or further among or chemist in a problem already suspected.* The Smith suspected from in the said it has was some of them. It did not matter the work of the laboratory matters when with has been inferred by the decision in July 14, 1??1. In the investigation with of the work of using the laboratory matters when

effective.

For the reasons stated the interlocutory appeal in this case is dismissed.

APPEAL DISMISSED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

4201a

29615

PEOPLE OF THE STATE OF ILLINOIS
ex rel. MAX U. MASOR,
Petitioner,

vs.

WILLIAM N. HOLANDER, one of the
Judges of the Municipal Court of
Chicago,
Respondent.

236 I.A. 635

MANDAMUS.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

This is an original proceeding in this court for mandamus, seeking to compel the defendant, one of the judges of the Municipal Court of Chicago, to sign and seal an alleged stenographic report of the proceedings at the trial of the case of The People against the relator, Max U. Masor.

In that case, upon a trial before the court without a jury, the relator was found guilty of the "criminal offense of unlawfully having in his possession intoxicating liquor containing more than one-half of one per cent alcohol," and sentenced to the House of Correction for thirty days. He sued out a writ of error in this court, which is pending.

The petition for mandamus states that within thirty days after the entry of said judgment, he presented to the defendant for his signature an alleged correct stenographic report of the proceedings at the trial, purporting to show that the relator was sentenced without any evidence having been heard, and that defendant marked it "Presented," but refused to sign it unless there was inserted therein the evidence taken in another case.

Defendant's answer to the petition is, in substance, that relator's case and another case entitled The People v. Fink were tried together; that the charge in each case "arose out of the same violation;" that both defendants waived a jury trial on the same day and both were thereafter arraigned and pleaded not guilty on the same day; that when the cases were called for trial, both defendants, by their counsel, "informed the court they were ready for trial, whereupon the trial proceeded as to both Fink and Maser;" that the evidence then heard "was applicable to both defendants;" that at the conclusion of the trial, the court entered judgment against Fink, but granted the request of Maser's counsel "to stay the order in the Maser case temporarily" until such counsel could bring certain matters to the attention of the court (which, as appears from exhibits attached to the petition, had reference to an alleged attempt on the part of another attorney to induce the relator to pay a large sum of money to "fix" the case); that an inquiry was made as to such matters, but nothing resulted except accusations and denials, whereupon, after several continuances and after the relator had presented an application for a change of venue, which was denied because it came "after all the evidence in the cases was heard," the finding and judgment against Maser was entered. The answer denies that a correct stenographic report was submitted to defendant, and states that he requested counsel for relator to include in the purported stenographic report which was presented to him the evidence heard as above stated.

To this answer, the relator filed a replication which, as we read it, does not take issue upon any statement of fact alleged in the answer. It denies that the two cases were tried "concurrently," but this is followed by statements showing that

the pleader intended nothing more by this denial than that the docket of the Municipal court does not show that any order, except for a continuance, was entered on the day the answer avers the two cases were tried together. The replication further states that there was "no order of consolidation nor any agreement or stipulation that the evidence in the case of People v. Fink shall be applicable to the case of People v. Hasor." The answer does not claim that there was any form of agreement or stipulation to that effect, or that any order was entered for the consolidation of the two cases. The material statements of the answer, viz: that the two cases were tried together and that the evidence heard was applicable to both defendants, are not denied by what is said in the replication. The "bill of exceptions" filed by the defendant in the case of People v. Fink is attached to the petition as an exhibit, and on reading it we find that the evidence therein recited mentions both Fink and Hasor. Whether such evidence is sufficient or insufficient to sustain the judgments is not involved in this case.

In the very early case of The People, ex rel. v. Jameson, 40 Ill. 93, where it was sought by mandamus to compel a judge of the Superior court to sign an amended bill of exceptions, the writ was refused because the return of the judge stated that the bill which it was sought to compel him to sign "does not state the facts as they occurred on the trial." The court held that while it is the duty of the trial judge to sign a bill of exceptions, yet it is his exclusive province to determine the correctness of the bill of exceptions which he is asked to sign. That case was followed with approval in People, ex rel.

v. Williams, 91 Ill. 91; and People, ex rel. v. Anthony, 95 Ill. App. 535. See also People, ex rel. v. Anthony, 149 Ill. 418, and People, ex rel. v. Chytraus, 183 Ill. 190.

As it clearly appears from the pleadings that the relator is not entitled to the writ he seeks, the petition for mandamus is denied.

MANDAMUS DENIED.

Barnes and Gridley, JJ., concur.

336 - 28201

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| WILLIAM WARDELL AND ERNEST WHITTAKER, Executors under the Last Will and Testament of Mary W. Wallace, Deceased, Appellees, v. BENJAMIN F. J. ODELL, Appellant. | 236 I.A. 635<br>APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

Opinion filed Jan. 21, 1925.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On March 3, 1924, this court entered judgment in this cause reversing the judgment of the Municipal Court, with finding of fact. Subsequently, by certiorari, our judgment was reviewed by the Supreme Court. That court, following Mirich v. Forschner Contracting Co., 312 Ill. 344, which was decided at the April term, 1924, and holding that where there has been a trial before a jury and the evidence in the case is conflicting, the statute does not authorize the Appellate Court to reverse a judgment for the reason that it has reached a different conclusion on a consideration of the facts from that reached by the trial court without remanding the cause for a new trial, reversed the judgment of this court and remanded the cause for further proceedings.

We, therefore, adopt our former opinion in this cause, (General No. 28201) with the exception that the finding

of fact will be stricken out and the judgment will be reversed and the cause remanded to the Municipal Court for a new trial.

REVERSED AND REMANDED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

33 - 29435

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

CHARLES CULLEN,
Plaintiff in Error.

236 I.A. 636
ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By information it was charged that defendant, Cullen, on May 5, 1923,

> "Did then and there play for money or other valuable thing at any game with cards, dice, checks or at billiards or with any other article, instrument or thing whatsoever, which may be used for the purpose of playing or betting upon or winning or losing money or other thing or article of value or shall bet on any game others may be playing in violation of Section 298 of Chapter 38, R. S., contrary to the form of the statute in such case made and provided."

Motion to quash information was made and denied. Defendant was found guilty and motion in arrest of judgment was denied. Defendant was fined ten dollars.

The judgment must be reversed, as the information is uncertain and insufficient in charging defendant with doing certain things in the disjunctive "or" instead of the conjunctive "and."

> "If a statute makes criminal the doing of this or that, mentioning several things disjunctively, there is but one offense which may be committed in different ways. *** But the conjunctive 'and' must ordinarily in the indictment take the place of 'or' in the statute else it will be ill as being uncertain." Bishop's New Crim. Proc'd., sec. 586.

A statute creating an offense in the disjunctive must be charged in an indictment in the conjunctive; otherwise it is uncertain. State v. Fairgrieve, 39 Mo. App. 641; Davis v. State, 23 Texas App. 637; Amer. & Eng. Enc. of Pleading and Practice, vol. 18, 490. There an indictment charges an offense in the language

of the statute the disjunctive should be changed to the conjunctive form. Seacord v. People, 121 Ill., 623. The only exception to this rule is where both words mean the same thing. Two words in the instant statute, chapter 38, sec. 298 (Cahill), "money," and "other valuable thing," are not the same.

It is meaningless to charge that the defendant did play "at any game."

It was error to deny the motion to quash the information and the motion in arrest of judgment. These points are not controverted here by the State.

The judgment is reversed.

REVERSED.

Hatchett and Johnston, JJ., concur.

49 - 29453

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| HOME FURNACE COMPANY, a Corporation, Defendant in Error, vs. JOSEPH SKUMRO, Plaintiff in Error. | ERROR TO MUNICIPAL COURT OF CHICAGO. |

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff bringing suit upon certain promissory notes upon trial had a verdict and judgment for $383.40.

Defendant asks a reversal upon the sole ground that, as he claims, the judgment is for a larger amount than was alleged to be due in plaintiff's statement of claim. The evidence is not in the record before us, so we must assume that the amount of the verdict was properly supported by the evidence on the trial. The ad damnum was $400 and the judgment was for less than this. A judgment may be rendered upon trial for any amount up to the sum laid in the ad damnum. Krueger v. Meeker-Wagner Co., 230 Ill. App. 376; Corpus Juris, vol. 1, p. 1190. The cases cited by defendant are all cases where a judgment was reversed because it exceeded the ad damnum, and are therefore not in point.

There being no error shown, the judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

80 - 29488

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

THOMAS O'SHEA et al.,
Plaintiffs in Error.

236 I.A. 636

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this writ of error defendants seek the reversal of a judgment against them entered upon the verdict in a trial of the charge of a conspiracy to injure and damage the business of certain employing firms in Chicago. By the verdict the punishment of defendants, Thomas O'Shea and William Riordan, was fixed at a fine of $100 each, and defendants Michael J. McKenna, Gus J. Dahl and Fred Jurich were fined $50 each. Motion for new trial was sustained as to Jurich and overruled as to the other defendants.

Defendants introduced no testimony, and the facts are not in controversy. In 1923 there were two organizations in Chicago connected with the upholstering and drapery business; one was the Carpet Upholsterers & Drapers Association, organized by employing firms engaged in this class of business, and the other was the Upholsterers International Union, comprising Locals 110, 111 and 112, composed of employes who had organized into a union. There had been a contract between these two organizations with reference to wages and hours of labor, which expired May 1, 1923, and negotiations were had with reference to a new contract, and committees were appointed by each organization to meet and discuss the terms of the proposed agreement. The employing firms deemed the new contract proposed by the employes' organization to be oppressive, and consequently they rejected it. It is claimed that it was in the endeavor to force the employers to accept this proposed con-

trast that defendants conspired to commit and did commit the acts complained of. A strike was called by the unions of employes, and pickets were placed around the shops of the employers, and stickers or posters were posted in buildings under construction where the employing firms had work. The firms put other men on the work, which was mostly laying linoleum or installing window shades. The pickets threatened these men working on the job and threatened the employing firms with trouble if they failed to employ people recognized by the union. The stickers or posters were printed by the unions involved and stuck upon windows and doors of the buildings where the employing firms were endeavoring to work. These posters or bulletins read as follows:

> "Notice, Building Trades. Demand union card from all window shade, drapery and curtain rod hangers, Local 111. Thank you. Dearborn 3603. 156 West Washington Street."

> "Notice Building Trades. Demand Union Card from all Carpet and Linoleum Layers, Local 110. Thank you. 166 West Washington Street. Dearborn 3603, Room 700."

The first was printed on pink paper, the second was printed in red type. The non-union employes were urged to leave their jobs and were called "scabs." Threats were made to stop all construction on buildings where the employing firms were attempting to work. The strike lasted from May 1, 1923, to October, 1923, and the employers were to a large extent prevented from carrying on their business, their work was delayed, or they lost contracts and were put to great inconvenience and trouble.

In June an injunction order was issues restraining the members of the union from further picketing, and it was after this date that the stickers or notices were pasted on the buildings involved. It is convincingly argued that while somewhat innocent in form, these notices were in fact threats of labor trouble to the owners of the buildings and also to non-union men attempting to work.

We have not attempted to set out the evidence of all the acts directed against the employing firms, as there is no controversy as to the occurrences.

Acts involving similar conduct of striking employes have been before us many times and the law to be applied has been stated frequently. Regardless of what has been held in other jurisdictions, in this State the law is that to picket an employer's premises under such circumstances is in itself an act of intimidation and an unwarrantable interference with the employer's rights, and hence illegal. Barnes v. Typographical Union, 232 Ill. 424; Dorsey v. Hennessy, 175 Ill. 308. In Wilson v. Hay, 232 Ill., 389, is an expression applicable to the notices or stickers posted in the instant case:

> "Such means as giving notices which excite the fear or reasonable apprehension of other persons that their business will be injured unless they do break off such relations or cease patronizing another are wrong and unlawful. If the notices given or things done have the natural effect of exciting such reasonable fear and apprehension and accomplish the result intended, it is immaterial that they are not accompanied by direct threats."

Other cases involving acts like that in evidence here, in which they were held illegal, are Purington v. Hinchliff, 219 Ill., 189; Anderson & Lind Manufacturing Co. v. Carpenters' District Council, 308 Ill., 498; Carlson v. Carpenter Contractors' Assn., 305 Ill., 331; People v. Marx, 201 Ill., 40; People v. Blumenberg, 271 Ill., 180; People v. Powers, 293 Ill., 600.

While seeming to concede that the things done by some of the striking employes were illegal, counsel for the defendants contend that the evidence fails to show that these defendants were involved. The essence of the offense of conspiracy charged is not the accomplishment of the unlawful object but is the unlawful combination or agreement to accomplish the unlawful purpose. It is not necessary to prove that the conspirators have agreed upon any particular means to effect their unlawful purpose, and they might

never have agreed upon the means, and yet the offense would be complete and might be proven by overt acts or other circumstances. People v. Blumberg, 271 Ill., 136. A conspiracy once formed is presumed to exist whenever and wherever one of the conspirators does some act in furtherance of its purpose, and where circumstances show that there is a common design to which all assented; it is not necessary that each one shall take an active part in the commission of the crime. People v. Powers, 293 Ill., 600. The evidence in proof of a conspiracy will generally, from the nature of the acts, be circumstantial, and it is sufficient to prove that the persons charged with the crime, by their acts, pursued the same object, although not necessarily by the same means - one person doing one thing and another another, but all with a view of attaining the same object. Cohn v. The People, 124 Ill., 399; The People v. Faughet, 174 Ill. App. 1.

It is especially urged that the evidence is not sufficient to sustain the conviction of William J. Riordan. Riordan was one of the members of the committee of the employes' unions which met the committee from the employers to negotiate a new contract. He was a business agent of Local 110, and spokesman of the committee. When the strike was called he was one of the pickets stationed at the premises of one of the employing firms, and it was shown that these pickets ordered non-union employes to quit and called them "scabs." He was also seen in the vicinity of other premises which were the object of picketing. Local 110 of which he was a business agent, authorized the stickers which were posted upon the premises involved. Applying to his conduct the rules with reference to the necessary proof of participation in the conspiracy, we hold that the jury could properly find that he was a participant therein and guilty as charged.

The evidence was also sufficient to convict the other defendants. Defendant O'Shea was a business agent for one of the employer' unions. He threatened a Mr. Larson, an employer, that if he failed to employ people recognized by the union he would have trouble. He was one of the instigators and active workers in the matter of posting stickers, and admitted that his union authorized the printing of the stickers, and that he himself had posted some. He also admitted his knowledge of the picketing. There is considerable evidence as to his activity in connection with the strike and the efforts to force the employers to agree to the terms of the new contract.

The same is true with reference to defendant McKenna, who was a business agent of Local 110. He also was active in the picketing and stickers.

Defendant Dahl attempted to get a contract to lay linoleum in one of the buildings, but the contract was let to Marshall Field & Co. Dahl threatened the general contractor on the building to make trouble for him unless he was permitted to lay the linoleum, that "Field's had scab men;" that if the linoleum was laid by the parties to whom Field & Co. sublet the contract, the other workmen in the building would be called off.

It is, of course, true that it was not unlawful for the agents of the business unions to call a strike, but it was unlawful to prevent others from working by threatening contractors, employers and employes with injury and loss unless the demands of the business agents were complied with.

There was evidence that during the strike linoleum and carpets laid by non-union labor were cut by some of the strikers. There were a number of instances involving threats, stoppage of work and other like interferences, which could be explained only as occurring in pursuance of a common design to

prevent the employing firms from conducting their business without unlawful interference from others. We hold that the evidence is sufficient to show the participation of the defendants in the illegal conspiracy charged and that the verdict of the jury was amply justified.

Witness Slater testified as to a conversation with defendant Jurish, and it is argued that this was incompetent on the ground that the conversation was not in the presence of the other defendants and therefore not binding upon them, for the reason that Jurish was afterwards discharged and was therefore not one of the alleged conspirators. ~~xxxxxxxxxxxxxxx~~. Jurish was not discharged but was granted a new trial. There was evidence in the testimony tending to connect Jurish with the conspiracy, and the jury was of the opinion that he was guilty. We do not understand that the fact that one of the defendants should be granted a new trial would render incompetent testimony tending to show his participation in the conspiracy along with the other defendants. Slater merely testified to an incident like a number of others which were in evidence and was merely cumulative. The situation as described by him was amply confirmed by other evidence.

Upon the entire record we hold that the guilt of the defendants was sufficiently proven and that no reversible errors occurred upon the trial; hence the judgment of the Criminal court is affirmed.

AFFIRMED.

Hatchett and Johnston, JJ., concur.

103 - 29512

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|---|---|
| JUNE KLEIN, Defendant in Error, vs. MAX AINSINGER, Plaintiff in Error. | ERROR TO MUNICIPAL COURT OF CHICAGO. |

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit upon an instrument in writing whereby defendant acknowledged and promised to pay a certain indebtedness, upon trial by the court had judgment for $7422.50, which defendant seeks to have reversed.

No bill of exceptions is before us, and errors, if any, are predicated upon the law record. The instrument evidencing defendant's indebtedness acknowledged his indebtedness to plaintiff of $7500, and he promised to pay this in installments with interest, the first due February 15, 1922, and the last August 15, 1923. Suit was commenced and the statement of claim filed March 23, 1923, at which date the last five installments of $500 each had not yet matured. The statement of claim, after giving credit to defendant for certain payments, alleged a balance due on March 22, 1922, of $4330.81. The sole defense asserted by the affidavit of merits was invalidity of the consideration for the note.

The case was reached for trial on May 1, 1924, at which time all of the last five installments had fallen due under the terms of the written instrument sued on. The record shows that on that date, by agreement between the parties, it was ordered that the statement of claim be amended by increasing the ad damnum to $8,000.

Defendant questions the judgment under the general rule that the rights of parties are determined as of the date of the

commencement of the suit, but the supporting cases cited are concerned with suits prematurely brought and are not applicable to the present suit, for at the time this suit was brought a number of the installments in the instrument of indebtedness had matured and were unpaid.

In the absence of a bill of exceptions every intendment will be indulged to sustain the judgment of the court below, and we must presume that the trial court had sufficient grounds for entering the judgment. Blair v. Ray, 103 Ill. 615; Mullen v. People, 138 Ill., 606; Cons. Coal Co. v. Fears, 166 Ill. 361; Town of Scott v. Artman, 237 Ill., 394.

In view of the fact that when the case was tried all of the installments had matured and that the only defense presented went to the entire obligation, it is a reasonable presumption that when it was agreed that the ad damnum should be increased to $8,000 the defendant waived any technical objection to the non-maturity of certain installments at the date of the commencement of the suit and consented to the entry of a judgment conditioned solely upon determination of the single defense presented in his affidavit of merits. Such a waiver would be entirely proper. Stitzel v. Miller, 157 Ill. App. 390. Under proper amendment items of the same nature as those originally sued for, which mature between the commencement of the suit and the trial, may be brought in. Davis v. The Stevens-Davis Co., 193 Ill. App. 374; Mt. Hope Cemetery Association v. Weidenmann, 139 Ill. 67; Doherty v. Schipper & Block, 250 Ill. 128.

In the absence of any bill of exceptions we must presume that the trial court had proper grounds to include in this judgment those installments which had matured between the date of the commencement of the suit and the date of the trial.

The judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

113 - 29522

BENJAMIN BLUMENTHAL,
Plaintiff in Error,

vs.

BARNEY BRAVERMAN,
Defendant in Error.

236 I.A. 636

ERROR TO THE COUNTY COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McCURDY
DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review proceedings under section 89 of the Practice act, wherein, upon motion after term, the trial court on September 16, 1924, vacated and set aside a judgment against defendant, rendered ex parte, for $428.60. Plaintiff asserts that the court erred in so doing.

A court has jurisdiction to set aside and vacate a judgment after the term at which it is entered for errors of fact but not for errors of law. Gruner v. Ill. Com. Men's Assn., 260 Ill. 516; Smyth, Adm. v. Varga, 307 Ill. 360; Barnes v. Chicago City Ry. Co., 185 Ill. App. 152. Courts of review will assume that such an order after term time was based on the finding that there was an error of fact. Helmes v. Helmes, 210 Ill. 320.

The record shows that the judgment was entered ex parte on the day before the last day of the August 1924 term of court. Within a few days thereafter, in the next term, defendant, after serving written notice upon plaintiff, filed his motion and affidavit asking that this motion be vacated. These asserted that the Chicago Daily Law Bulletin is a publication used in the city of Chicago by lawyers for the purpose of watching the trial calls in the various courts of Cook County and checking up the orders entered in the cases; that on September 3, 1924, this Bulletin published as a fact that this cause had been continued to September

21, 1924, whereas the court had ordered that it should be continued to September 4, 1924, and that the reason of the Bulletin's error was the figure "4" made by the court's clerk in his minutes so carelessly that it appeared as the figures "21," and that this was done by making the first stroke of the figure "4" look like a "2" and the second stroke, which was detached from the first stroke, look like the figure "1;" that counsel for the defendant relied upon the Law Bulletin as to the published order that the case was continued to September 21, and therefore did not know that the case was on the trial call calendars for September 4th or 5th, and consequently did not attend the court call on either of said dates and was not present at the time the case was called for trial or when judgment was entered; that the trial court did not have knowledge of the fact that the Law Bulletin had published an order that the case had been continued to September 21, and that had the trial court known of this published order it would not have permitted plaintiff to have proved up his case upon an ex parte hearing or have entered judgment on September 5th. No counter affidavits were filed nor demurrer to the motion and affidavit, therefore these statements must be taken as true. The Chicago Daily Law Bulletin has been for many years used by the attorneys of this county as a source of information as to trial calls and court orders, and attorneys necessarily must and do rely upon these published orders. We hold that the mistake in the published order that the case was continued to September 21, was such a mistake in fact that, if the trial court had known, it would not have proceeded to try the case and enter judgment on a prior day without the attendance of counsel for the defendant.

Furthermore, plaintiff cannot now question in this court the validity of the order of September 16, 1924, vacating and setting aside said judgment for the reason that no objection

was made thereto or exception taken to the entry of said order. To present to this court the question whether the motion to vacate showed any cause for annuling the judgment, which is a question of law, he should, under the rules of practice applicable to suits at law, have saved that question in some appropriate way recognized by law. This he failed to do. The question of the propriety of the order has not been preserved in the record, and therefore plaintiff cannot urge here as error the vacating of the judgment. Harris v. Chicago N. W. Co., 314 Ill., 500; Smyth, Adm. v. Farmo, 307 Ill., 300; Village of Bradley v. N.Y.C.&S.R.Co., 296 Ill. 383; Bailey v. Conrad, 271 Ill., 294; Domitski v. Amer. Linseed Co., 221 Ill., 161; Lamb v. City of Chicago, 219 Ill., 229; H. J. Andrews & Co. v. Anchor F. B. Mfg. Co., 210 Ill. App. 636; Grainger v. State Board of Health, 172 Ill. App. 428; Hassem v. Fox, 167 Ill. App. 1.

In argument counsel for plaintiff refers to a motion to vacate the order vacating the judgment, which motion was denied. The abstract contains only a bare recital of the making of such a motion and its denial. This does not present in any way any question of law or fact for this court to review.

For the reasons above indicated the order of the trial court of September 16, 1924, is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

[illegible] changes or amendments taken in the history of this [illegible]
to prevent to this court the questions whether the motion to
[illegible] should have any course for modifying the judgment, which is a
question of law, he should, under the rules of practice, [illegible]
in order to law, have raised that question in some authoritative way
recognized by law. This he failed to do. The question of the vac-
ating of the order has not been preserved in the record, and therefore
[illegible] not a question of law in this
case. Sparks v. Pierce, 115 U.S., 408 [illegible]; Dower Lumber Co. v.
Pierce, 207 U.S., 285; Pittsburg & Pacific v. [illegible], 148 U.S.,
[illegible]; Dalton v. Pennsylvania, 201 U.S., 543; Hartshorn v. Sioux City
[illegible], 118 U.S., 343; Lamar v. [illegible], 150 U.S., 165;
[illegible] v. Brown [illegible], 150 U.S., [illegible]; [illegible] v. [illegible], 150
U.S., 287; [illegible] v. Chicago [illegible], 150 U.S., 149; Dower v.
Pierce, 207 U.S., 285.

A motion to vacate an order for plaintiff's return to a motion
to vacate the order vacating the judgment, which motion was denied.
The district decisions only a form vacated of the vacating of such a
motion and its denial. This does not present in any way any
question of law or fact for this court to review.

For the reasons above indicated the order of the
trial court of December 14, 1906, is affirmed.

Affirmed.

Mr. Justice McKenna, Mr. Justice Brewer, Mr. Justice Harlan and Mr. Justice Moody, dissent.

49 - 28697

4754a

ROBERT E. RICKSEN,
Appellee,

vs.

ROY A. H. THOMPSON,
Appellant.

236 I.A. 637

APPEAL FROM CIRCUIT COURT OF

COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a suit in equity brought by Robert E. Ricksen, the complainant, against Roy A. H. Thompson and F. A. Brewer to recover 6091 shares of stock which are alleged to be the balance of shares due to Ricksen as his portion of a joint business adventure in which Ricksen, Thompson and others were engaged. The cause was referred to a Master to take proofs. The Master found in favor of the complainant. The court confirmed the Master's report, found that the material allegations of the complainant are true, and sustained by the evidence, and entered a decree substantially in conformance with the prayer of the bill of complaint. From the decree the defendant Roy A. H. Thompson appealed.

The complainant alleges substantially as follows: that in the year 1916 the complainant became acquainted with the business of Bunte Brothers, a corporation, engaged in the manufacture and sale of candy; that he learned there was need for larger factory facilities to meet the demands of the business of the corporation; that representatives of the corporation's controlling owners told the complainant the corporation would sell out at a fair price; that the complainant interviewed the defendant Roy A. H. Thompson with reference to associating with the complainant in an effort to acquire and dispose of the capital stock and business of Bunte Brothers; that Thompson stated that he could control sufficient capital to buy the stock and reorganize the business; that Thompson and the complainant then agreed that the profits realized from any

sale, pursuant to such purchase or through such reorganization, or otherwise, should be divided between them equally; that in accordance with such understanding the complainant negotiated with representatives of the controlling stockholders of the Bunte Brothers corporation and secured necessary data, so that a definite proposition could be submitted for the purchase or reorganization of the business; that the negotiations continued from October, 1916, to some time in May, 1917; that during the negotiations Thompson suggested to the complainant that F. A. Brewer be invited to become associated with them in the adventure; that the complainant and Thompson submitted their plan to Brewer and Brewer joined the adventure; that later Brewer suggested that R. E. Wilsey be invited to join in the adventure; that Wilsey did join in the adventure but before its consummation withdrew; that the complainant Thompson Brewer and Wilsey were associated together in the joint adventure of purchasing, reorganizing, enlarging, holding, selling or otherwise disposing of the business of Bunte Brothers, including the capital stock, assets and good will; that by common consent of all of the parties to the joint adventure Thompson, Brewer and Wilsey undertook and agreed to finance the joint adventure, and the complainant was to conduct the negotiations with the stockholders of Bunte Brotherag that after long and skillful negotiations, extending over several months, the complainant effected the purchase of the business at $900,000; that this amount was $9,000 less than Thompson, Brewer and Wilsey were willing to pay, and had believed it necessary to pay; that it was agreed by the complainant and Thompson, Brewer and Wilsey that the purchase should be for the joint benefit of Thompson, Brewer, Wilsey and the complainant in pursuance of the joint adventure; that on December 28, 1916, the complainant, Thompson, Brewer and Wilsey met for the purpose of agreeing upon their respective interests in the joint

adventure; that it was agreed by them that the complainant's interest in the joint adventure was to be based on $1,000,000 of preferred stock and $1,000,000 of common stock to be authorized; that the complainant was to have as his portion of the joint adventure 1,100 shares of common stock of the par value of $100 each, or $110,000 par value; that in accordance with this understanding Thompson, Brewer and Wilsey signed and delivered to the complainant the following written agreement:

"F. A. BREWER & CO.
Bankers.
Continental and Commercial Bank Bldg.
Long Distance Telephones Wabash 6332 and 6333
Cable Address 'Fabrewer.'
CHICAGO.

December
Twenty-eight,
1916.

Mr. Robert E. Ricksen,
Chicago, Illinois.

Dear Sir:

In the event of our present negotiations for the purchase of all of the stock and good will of Bunte Brothers, an Illinois corporation, being consummated, we, the undersigned, F. A. Brewer, R. E. Wilsey and Roy A. H. Thompson, hereby agree to deliver to you in full for our share of commission for services rendered us 1100 shares of the common stock at par value of $100 per share of the new corporation to be formed to take over the business of the present Bunte Brothers; it being understood that the present capital stock of said new corporation will be $2,000,000.00 divided as follows, to-wit: $1,000,000.00 Preferred stock and $1,000,000.00 Common stock. Certificates of said stock will be delivered to you immediately if, as and when issued and delivered to us.

Very sincerely yours,
F. A. Brewer,
R. E. Wilsey,
Roy A. H. Thompson.

ACCEPTED:
Robert E. Ricksen."

That the complainant immediately accepted the agreement by writing his acceptance thereon; that afterward and before the purchase and reorganization of the business was effected, Wilsey voluntarily withdrew from the joint adventure without in any manner affecting the interest of the complainant therein; that thereafter the complainant, Thompson and Brewer continued in the joint adventure

and conducted it to a final and successful conclusion; that subsequent to the execution of the instrument dated December 28, 1916, it was determined that the common stock should be of the par value of $10 per share and the number of shares to be received by the complainant was increased to 11,000; that after the execution and delivery of the instrument dated December 28, 1916, it was determined by the complainant, Brewer and Thompson that instead of organizing a new corporation to take over the business, the authorized capital stock of the business should be increased by proper corporate action to $2,000,000 divided into 10,000 shares of preferred stock of the par value of $100 each, and 100,000 shares of common stock of the par value of $10 each; that the reorganization should be effected by the purchase of all of the preferred stock, when increased, at the price of $90 per share, to be thereafter sold to obtain $900,000 to pay the stockholders of Bunte Brothers for their stock holdings; that the common stock should be the property of the joint adventure, less 30,000 shares to be given to Theodore Bunte to secure his services in the reorganized business; that the joint adventure was successfully concluded and consummated; that although Thompson and Brewer have received the benefits of the adventure they have issued and delivered to the complainant only 4,909 shares of the common stock, and have withheld and refused to issue and deliver to the complainant the balance of 6,091 shares to which the complainant is justly and equitably entitled; that the complainant charges upon information and belief that Thompson has issued, or caused to be issued to himself or to some person unknown to the complainant the 6,091 shares of common stock which rightfully and equitably belong to the complainant, whereby Thompson has wrongfully and fraudulently appropriated the shares to his own use; that by reason of such action of Thompson

the 6091 shares are held as a trust in equity for the use and benefit of the complainant; that whoever holds the shares ought in equity and good conscience to be compelled to assign and transfer them to the complainant; that after complainant learned of such wrongful and fraudulent issuance and holding of the 6091 shares he demanded that the defendant transfer and assign them to him, but that Thompson, with intent to cheat and defraud the complainant, has refused and still refuses to transfer and assign the shares of stock or to deliver to complainant any dividend or other profit or earnings of the shares, if any there are; that the shares of stock are of great value; that the complainant is unable to state the exact or even approximate value, but avers that the value is increasing and will increase continuously; that the business is profitable and will pay large dividends on the shares of stock; that the Bunte Brothers' business was established in 1876, and has ever since been continuously carried on; that the reputed excellence of its products is established throughout the United States; that it has retained the services of Theodore W. Bunte as its manager by contract for ten years next ensuing; that he was manager of Bunte Brothers during many years past, and is known and recognized by the trade throughout this country as a candy manufacturer of extraordinary skill and ability; that his connection with the company of itself gives to the shares a peculiar and unusual value; that without the aid of a court of equity to enforce discovery, the complainant is and will be unable to ascertain who holds said shares that belong to the complainant, or what dividends, if any, have been paid thereon; or to obtain either said stock or dividends, and will thereby suffer great and irreparable loss and injury.

The specific prayer of the bill is as follows: that the defendants be required to disclose in whose name the 6091 shares of common stock now stand; to whom certificates therefor

have been issued; who has possession or custody thereof; to disclose and account for any dividends paid on the shares and to whom paid; that the shares may be impressed with a trust in favor of the complainant; that whoever holds the shares may be declared a trustee and compelled by decree to transfer the shares to the complainant; that upon the accounting the defendants or such of them as may have received any money by way of dividends or otherwise, on the shares, may be decreed to pay the same to the complainant, and that the complainant may have execution therefor.

The answer of the defendant raises four principal issues: First, that the enterprise is not a joint adventure. Second, that the complainant has an adequate remedy at law and is not entitled to relief in equity. Third, that the complainant by reason of accepting $7,000 from the Buntes has been guilty of disloyalty to his associates, and has thereby forfeited all right to compensation. Fourth, that the complainant sought money from the Buntes and therefore does not come into court with "clean hands."

The evidence is voluminous, but it will be necessary to state the evidence only in so far as it relates to the issues in controversy.

We are of the opinion that on the allegations of the bill of complaint in regard to the nature of the business association of the complainant and the defendant, which allegations are supported by the evidence, the enterprise in which the complainant and the defendant were engaged was what is known in law as a joint adventure.

The agreement between the complainant and the defendant was that the complainant "would handle the Buntes" and the defendant "would handle the financial end;" and that the complainant and defendant would divide the profits equally between them. When Brewer and Wilsey became associated with the complainant and the defendant

in the joint adventure the nature of the complainant's relation to the joint adventure was not changed; the only difference was that the complainant's share of the profits was reduced.

In their brief counsel for the defendant maintain that "there is nothing of the nature of partnership in the arrangement between the parties;" that "it is a simple employment, the compensation payable out of the earnings to which the service contributes." In their oral argument counsel for the defendant stated that "the contract upon which the suit is based was made by a special partnership of the three men, Thompson, Brewer and Wilsey." In our opinion if the association of Thompson, Brewer and Wilsey constituted a special partnership, then the complainant's association with these parties constituted a special partnership; as his relation to them does not differ substantially from their relation to each other. But it is not necessary to determine whether the enterprise was strictly a general partnership or a special partnership. It was an arrangement which partook of the nature of a partnership and was, as we have stated, what may be termed a joint adventure.

The rule is well established that equity has jurisdiction over joint adventures. A party to a joint adventure may, in certain instances, maintain an action at law, but the remedy at law will not preclude a suit in equity. Joint adventures are described as follows in Corpus Juris:

"The subject of joint adventures is of comparatively modern origin. It was unknown at common law, being regarded as within the principles governing partnerships. While some courts hold that a joint adventure is not identical with a partnership, it is regarded as of a similar nature, and governed by the same rules of law. One distinction lies in the fact that while a partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction,

although the latter may comprehend a business to be continued for a period of years. Another distinction is that a corporation incapable of becoming a partner may bind itself by a contract for a joint adventure, the purposes of which are within those of the corporation. The principal distinction, however, is that in most jurisdictions where any is regarded as existing, one party may sue the other at law for a breach of the contract or a share of the profits or losses, or a contribution for advances made in excess of his share; but this right will not preclude a suit in equity for an accounting. The contract need not be express but may be implied from the conduct of the parties." 23 Cyc, p. 453.

It is stated in Ruling Case Law: "While it is true that at common law coadventureres in an enterprise were recognized in courts only when the element of partnership was disclosed and on proof of the essential of a partnership, this is not the law at the present time, and, although courts in modern times do not treat a joint venture as identical with a partnership, it is so similar in its nature and in the contractual relationships created thereby, that the rights as between the adventurers are governed practically by the same rules that govern partnerships." 15 Ruling Case Law, p. 500.

Corpus Juris further states: "The fiduciary relation existing between members of a joint adventure confers upon courts of equity jurisdiction to hear and determine all controversies arising between them, and this jurisdiction will be exercised, even though complainant may have a remedy at law for the redress of his grievance; and especially is this true when the controversy is of a complex character." 33 Corpus Juris, p. 867.

It has been expressly held by Appellate courts in Illinois that joint enterprises, which, although not strictly partnerships, but which closely partake of the nature of partnerships, are governed by the rules and principles of partnerships. Slater v. Geo. M. Clark & Company, 68 Ill. App. 433, 437; Edwards

v. Hudson, 165 Ill. App. 521, 528; Hull v. Parsons, 145 Ill. App. 436, 438. A contract concerning a joint adventure does not need to be express, but may be implied from the conduct of the parties. Jackson v. Hooper, 76 N. J. Eq. 185, 199.

Counsel for the defendant make the following assertion: "Joint adventure is illustrated by and its difference from the case at bar is shown in Ingraham v. Mariner. (It should be Mariner) 194 Ill. 209 (It should be 269); Law v. Warn, 238 Ill. 360, 367; Currier (It should be Bunn) v. Schnellbacker, 59 Ill. App. 222; Dicus v. Sherer, 277 Ill. 168." These cases are not analyzed or discussed by counsel for the defendant. We have examined them, however, and we do not think that they bear any such construction as is contended for by counsel for the defendant. One of the cases, namely, Ingraham v. Mariner, contains language which is against the contention of counsel for the defendant. In considering the interest of one of the parties to an agreement, the construction of which, according to the court, was "the main object of the bill," the court said (p. 277): "Although his interest was only to be a share of the profits, yet that share was to be his by virtue of his desire to take an interest in the land. *** It may not be necessary to determine, nor is it material what the precise nature of the interest taken by him under the contract was. It may not have been strictly a partnership interest, or the interest of a beneficiary in a trust, but it was such an equitable interest in Cooper and his assigns as gave them the right to have the property sold in order to establish their rights. Cooper certainly had a beneficial interest in the proceeds of the land, and that interest would attach to the net profits arising upon the sale of the property."

Counsel for the defendant contend further that the written contract of December 28, 1916, signed by Brewer, Wilsey and the defendant, superseded the "initial arrangement" of the complainant and the defendant, and changed the status of the complainant to

the enterprise; that "there is nothing in the record to show that Brewer and Wilsey ever knew of the superseded arrangement between Bicksen and Thompson alone; hence it in nowise colored the agreement of December 28th." As we interpret the evidence Brewer and Wilsey were fully aware of the relations existing between the complainant and the defendant; and the relation that the complainant bore to the enterprise after Brewer and Wilsey joined it was substantially the same as the complainant's status before they joined. The evidence shows that the defendant introduced the complainant to Brewer "as being the man who brought the Bunte deal to" the defendant; that the defendant asked the complainant to "convince" Brewer that the deal was a good investment; that the complainant explained fully to Brewer the nature of the transaction; that the defendant introduced the complainant to Wilsey and asked the complainant to tell Wilsey about the business, and that the complainant "outlined the proposition to Wilsey in an effort to convince him how it was a stable proposition and one good for investment."

Brewer testified that the complainant was "a partner in the Bunte deal;" that he was not a partner "in the selling profits of the office," but that he was a partner "to the extent of his stock that he was to get." Brewer further testified that he told the defendant that he thought that the complainant was "entitled to his stock."

Wilsey testified that the complainant "was supposed to be the man who originally brought the deal" to the defendant; and that the defendant "later invited Mr. Brewer and myself in the deal." The written agreement of December 28, 1916, merely fixed the amount of the shares of stock that the complainant was to receive after Brewer and Wilsey had joined the adventure. When the complainant and the defendant were the only parties in the ad-

venture, the complainant was to share equally with the defendant in the profits. After Brewer and Wilsey were taken into the adventure it was necessary to have a new agreement as to the complainant's share of the profits. This new arrangement was effected by the written agreement of December 28, 1916. As we have previously stated, we do not think that the written agreement of December 28, 1916, changed the status of the complainant, but that he still continued to be a co-adventurer.

Counsel for the defendant maintain that "the only equity which the bill ever seeks to cover is that of a joint adventure." We do not agree with counsel. There is another ground for equitable relief stated in the bill of complaint which is independent of the question whether the enterprise was a joint adventure, and whether the complainant was one of the co-adventurers. This independent ground is that the stock withheld by the defendant is impressed with a trust and that the defendant holds the stock as trustee for the complainant. The chancellor, in his decree, held that the complainant was equitably the owner of the 6091 shares of stock, and that the defendant is the trustee of those shares for the use and benefit of the complainant. We concur with the opinion of the chancellor.

Equity will enforce the specific performance of a trust even though the trust relates to personal property and not to realty. Parker v. Garrison, 61 Ill. 250, 254; Ames v. Witbeck, 179 Ill. 458, 475.

We do not think that the complainant has an adequate remedy at law. It is necessary to the defense at law "that the remedy should be as clear, efficient, complete and effectual as in equity." People v. Bordeaux, 242 Ill. 327, 333. We think that it is clear that the relief prayed for in the bill of complaint, which relief we are of the opinion the complainant is entitled to

contract, the complainant was to share equally with the defendant in the profits. Later Spencer and Milsap were taken into the venture; it was necessary to have a new agreement as to the complainant's share of the profits. This new arrangement was effected by the written agreement of December 28, 1918. As we have previously stated, we do not think that the written agreement of December 28, 1918, changed the status of the complainant, but that he still remained to be a co-adventurer.

Counsel for the defendant maintain that "the only equity which the bill can seek to cover is that of a joint adventure." We do not agree with counsel. There is another equitable relief stated in the bill of complaint and in independent of the question whether the enterprise was a joint adventure, and whether the complainant was one of the co-adventurers. This independent ground is that the stock withheld by the defendant is impounded with a trust and that the defendant holds the stock as trustee for the complainant. The chancellor, in his decree, held that the complainant was equitably the owner of the 6000 shares of stock, and that the defendant is the trustee of these shares for the use and benefit of the complainant. We concur with the opinion of the chancellor.

Equity will enforce the specific performance of a trust even though the trust relates to personal property and not to realty. Fowler v. Bailey, 11 Ala. 364; Cone v. Dillard, 47 Ala. 1; 1 Pom. Eq. 474.

We do not think that the complainant has an adequate remedy at law. It is necessary, to the decree of law "that the remedy should be as clear, efficient, complete and effectual as in equity." Pomeroy v. Bunkhouse, 94 Ala. 597, 599. We think that it is clear that the relief sought for in the bill of complaint, with the relief as are of the opinion the complainant is entitled to

on the evidence, could not be obtained in an action of *indebitatus assumsit*, as is contended for by counsel for the defendant.

A further contention of counsel for the defendant, and the principal one on which they rely, is that the complainant, whether he is considered a joint adventurer or an agent, has not only forfeited all right to the share of stock in controversy, but all right to any compensation whatever by reason of his disloyal conduct towards his associates.

It is not contended by counsel for the defendant that the complainant did not fully and efficiently perform his part of the agreement. Counsel for the defendant in their brief concede and the answer of the defendant admits that the complainant "was active and efficient." On the hearing before the Master counsel for the defendant admitted that the complainant "got the whole deal;" that the complainant "had done all that he had undertaken to do." On oral argument counsel for the defendant stated that the complainant "was a capable man;" that "he brought this thing about." It is obvious, therefore, that the disloyalty with which counsel for the defendant charge the complainant did not in any way result in the slightest injury to his associates or to the advantage of the Buntes. It is not maintained by counsel for the defendant that the interests of the associates of the complainant were neglected, impaired or betrayed by the alleged misconduct of the complainant, or that the interests of the Buntes were given any advantage. The evidence shows that the complainant was the essential factor in bringing about the successful consummation of the enterprise, and that his associates were entirely satisfied with his work. But counsel for the defendant contend that the rule prohibiting disloyalty requires the utmost good faith between parties engaged in an enterprise such as the one in the case at bar; that the rule is founded on public policy, and is not intended to be remedial of

actual wrong, but preventive of the possibility of wrong; and that under the rule it is immaterial whether the alleged disloyalty of the complainant resulted injuriously to his associates or not. Counsel for the defendant cite authorities in support of their position.

We are of the opinion that the evidence does not show that the complainant was disloyal. In this view it is unnecessary for us to consider the authorities cited by counsel for the defendant. Granting, for the sake of argument, that counsel for the defendant have correctly stated the rules of law governing the question of disloyalty in a transaction such as the one in the case at bar, we are of the opinion that, tested by those rules, the complainant's conduct does not amount to disloyalty.

It is true that the complainant had a conversation with the defendant in which, according to the defendant, the complainant said he, the complainant, could get $10,000 from the Buntes, and, according to the complainant, that he had "an idea" that he, the complainant, could get about $10,000 from the Buntes. In this conversation with the defendant the complainant said further that he would divide the amount, $10,000, equally with the defendant. The defendant refused the proposition, saying, according to the complainant, "Don't count me in on that," and, according to the defendant, that it would be "unethical" and "illegal." The defendant also testified that he asked the complainant not to get the $10,000 from the Buntes, "to forget all about it," and that the complainant said that "he would not take anything from the other side."

In this incident it will be observed that the complainant's proposal was made to the complainant's associate, the defendant, not to the Buntes. The complainant's conduct was not that of soliciting a bribe or compensation from the Buntes, and

in our opinion did not amount to a disloyal act.

The evidence shows further that while negotiations were pending the complainant asked Theodore W. Bunte to sign a paper in which the Buntes would agree to give the complainant $15,000; that the complainant said to Theodore W. Bunte, "there was talk about itamong the folks;" that Bunte refused, saying "not on your life; if you are to get anything from anybody, they will have to give it to you, but not to my knowledge;" that the complainant replied, "That is all right with me." Counsel for the defendant maintain that the act of the complainant in regard to the $15,000 was a solicitation for compensation from the Buntes and was a disloyal act sufficient, in itself, to forfeit the complainant's right to share in the profits of the enterprise in which he was associated with the defendant.

We do not agree with counsel for the defendant that this act of the complainant was sufficient, in itself, to forfeit complainant's right to compensation. As the complainant did not receive the $15,000 from the Buntes, no act of disloyalty was actually committed. We do not think that the rule in regard to disloyalty extends to a case of an attempted disloyalty. No authority has been cited by counsel for the defendant which holds that the mere attempt by a co-adventurer or an agent to commit a disloyal act is sufficient in itself to forfeit the right of the co-adventurer or agent to compensation.

The serious question in connection with the alleged disloyalty of the complainant arises from the undisputed fact that the complainant accepted $7,000 from the Buntes after the consummation of the enterprise. Counsel for the defendant contend that the $7,000 was paid to the complainant by the Buntes in pursuance of an agreement between the complainant and the

Buntes made before the enterprise was consummated.

Counsel for the complainant maintain that the $7,000 was given merely as a gratuity, and not in accordance with any pre-arrangement or understanding between the complainant and the Buntes.

The defendant testified that after the complainant had been given 4909 shares of stock of the 11,000 shares which he was to receive under the agreement, the defendant learned that the complainant had received $7,000 from the Buntes; that there was an interview at which the complainant, the defendant and Brewer were present; that the complainant said, "You knew my original arrangement with the Buntes was for $15,000, and certainly I should have some consideration now when I cut my compensation down to $7,000 in order that this deal might go through;" that the complainant said he did it because he needed the money, and that he had done wrong; that he asked to be forgiven; that "substantially the conversation" between the defendant and the complainant was as follows: that the complainant said: "Roys, I want you to forgive me. I have felt for many days that you knew what I did. When I came into the office you were not cordial to me, and this coldness indicated that you knew what I had done. I have seen Mr. Bunte and told him all. I made a big mistake. I did wrong, and I am willing to do anything to right myself;" that he, the defendant, said "Why did you do it after you had promised me in the winter time that you would not accept a commission on the other side?" that the complainant said, "I did it because I needed the money;" that he, the defendant, said, "But I told you one or two times that I would loan you money if you were hard up;" that to this the complainant "had no special reply, as I remember."

The defendant also testified that he heard a conver-

sation over the telephone between Brewer and the complainant, in which Brewer asked the complainant if the complainant was "getting anything from the Buntes on this deal;" that the complainant replied, "No, the only thing I am getting, the only compensation I am getting on this deal, I am getting from you;" that his, the defendant's, secretary was at the keyboard and overheard the conversation; that he was in a position to see her and knew that she was on the wire at this time.

The secretary was not questioned in regard to this alleged conversation, nor was Brewer. The complainant denies that he made any of the above statements testified to by the defendant in regard to the $7,000 which he, the complainant, received from the Buntes.

The secretary of the defendant testified on behalf of the defendant that she heard parts of the conversation in the interview between the complainant, the defendant and Brewer in Brewer's office; that the voices were loud and that there was a lot of excitement; that the complainant was crying and saying, "Gentlemen, I did not mean to do it. *** My back was to the wall. I needed the money and I did not see why I could not get it."

Brewer testified on behalf of the defendant that at the interview between him, the defendant and the complainant, the defendant told the complainant that Bunte had said that he had paid the complainant $7,000; that the complainant admitted receiving the money, and that he was "very much perturbed;" that he, Brewer, did not remember whether the complainant admitted that "he had at first made a contract with the Buntes under which he was to receive $15,000, and that it was subsequently reduced to $7,000;" that he, Brewer, did not remember whether the complainant admitted that "he had entered into a contract with Bunte Brothers, or with any of them, to the effect that if this deal went through

he was to receive compensation for his services in bringing about the deal."

Theodore W. Bunte testified on behalf of the defendant in regard to the payment of the $7,000 to the complainant by the Buntes, that he, Bunte, "handled all of these negotiations from start to finish; that he had been delegated by his father and his uncle to handle all of these negotiations;" that prior to paying the $7,000 he did not tell the complainant that he was going to pay him the $7,000; that "a considerable time" after the final contracts were signed he called the complainant on the telephone and told him to "come over;" that when the complainant arrived he, Bunte, said in substance: "My father and uncle have determined that they wanted to do something for the boys and that they had concluded that you ought to be remembered; that that was for the service and work that he had rendered and that I was ordered to give him this;" that it was not because of any prearrangement or contract and that prior to that time he, Bunte, had not had any understanding with the complainant that he "was to receive anything, not a penny."

The complainant testified that prior to the time that he received the $7,000 from the Buntes he "never had any understanding, agreement or conversation with any of the Buntes with reference to receiving the $7,000 if the deal went over;" that Theodore W. Bunte asked him over the telephone to come over to his, Bunte's, office; that there was "something important;" that when he got there Bunte said, "By the way, I have got a surprise for you;" that Bunte walked over to the bookkeeper's desk and indicated to the bookkeeper that he wanted something; that the bookkeeper opened a drawer in the desk and pulled out a check; that Bunte said, "Here, Bob, this is for you;" that he, the complainant

he was in serious correspondence for his brother in bringing about the deal."

Theodore W. Burke testified on behalf of the defendants and in reply to the question of how $17,000 is the amount stated by the Burkes, that is, Burke, "handled all of these negotiations from start to finish; that he had been delegated by his brother his entire or partial all of their negotiations; that prior to paying the $17,000 he did not tell the negotiator that he was going to pay them the $17,000; that "a substantial part of the final negotiations were aligned by calling the negotiator on the telephone and tell him to 'come great' than when the negotiator arrived to Akron, that is unknown. The Jones had stated that negotiations had been moved to a conference for the sole purpose that they had indicated that perhaps it is to substantiate that that was for the service not such that is the instance but that I was asked to give the money" that it was not because of any pressure exercised by anyone and that prior to that time Mr. Burke had not had any conversation with the negotiator that it was a transfer settlement, not a sale."

The negotiator testified that prior to the time that he received the $17,000 from the Burkes he "never had any dealings, conference or negotiation with or at the Burke and received no receipts for receiving the $17,000 at the time and that never." When asked if Mr. Burke said that "he had delegated to you the authority to make the settlement" the negotiator, Gilbert, said that Burke was "handling negotiations" and when he gave the money, said, "Mr. Gil, here, I have got a message for you." and that Burke said to the negotiator "I am the brother-in-law of the Jones." The negotiator testified that he "never received a message to the deal and pulled out a check, then Burke said, 'Here, Gil, this is for you'" when he, the negotiator,

looked at it and saw it was for $7,000, signed by T. W. Bunte; that he, the complainant, said, "Gee! well that is pretty fine. How does this come?" that Bunte said, "My father and uncle have turned over the dividends to us as a bonus, and we are dividing them up; they wanted you to be counted in on the bonus; that covers everybody, - Charlie, Oscar and myself."

The stenographer for Brewer testified on behalf of the complainant that she recalled the interview between the complainant, the defendant and Brewer; that she was in the room occupied by the secretary of the defendant, standing "right beside" the secretary of the defendant, and was as close to the door leading to Brewer's office as the secretary of the defendant was; that she, Brewer's stenographer, heard a lot of voices but could not distinguish anything that was said; that the doors were closed between Brewer's office and the outer office; that the door was closed between the private office of Brewer and the office occupied by the secretary of the defendant; that there were no transoms or openings above either door; that the doors were heavy mahogany; that the partitions in Brewer's office were mahogany and reached almost to the ceiling all around.

It will be observed on an analysis of all of the above testimony which we have stated in regard to the payment of the $7,000 to the complainant by the Buntes, that the defendant is partly corroborated by his secretary as to what the complainant said in the interview between the complainant, the defendant and Brewer, but that the defendant is not corroborated by Brewer; that the defendant is not corroborated by anyone as to the telephone conversation which he testified took place between the complainant and Brewer; that his secretary, who the defendant says overheard the conversation, was not questioned about the incident; that the testimony of both Theodore W. Bunte and the complainant is directly

looked at it and now it was for $7,000, signed by T. V. Dunphy, that is, the complainant, said, "that will that is pretty fine. Who does this belong to?" that Dunphy said, "My father and uncle have turned over the dividends to us as a bonus, and we are dividing them up; they wanted you to be counted in on the bonus; that covers everybody, - Charlie, Oscar and myself."

The stenographer for Brewer testified as behalf of the complainant that she recalled the interview between the complainant, the defendant and Brewer; that she was in the room occupied by the secretary of the defendant, attending "rights and" the secretary of the defendant, and was so close to the door that she to Brewer's office as the secretary of the defendant was; then she, Brewer's stenographer, heard a lot of things she would not distinguish anything that was said; that the doors were closed between Brewer's office and the outer office; that the door was closed between the private office of Brewer and the office occupied by the secretary of the defendant; that there were no interruptions or speaking above either door; that the doors were heavy mahogany; that the partitions in Brewer's office were mahogany and reached above to the ceiling all around.

It will be observed on the multiple of six of the above testimony that, as Lee might be expected on the receipt of the $7,000 to the complainant by the Brewer, that the defendant is partly corroborated by his secretary as to what the complainant said in the interview between the complainant, the defendant and Brewer, but that the defendant is not corroborated by Brewer; that the defendant is not corroborated by anyone as to the telephone conversation which he testified took place between the complainant and Brewer; that his secretary, who the defendant says overheard the conversation, was not questioned about the testimony that the testimony of his Brewer's stenographer is directly

contrary to the testimony of the defendant; and that the testimony of the stenographer of Brewer tends to impeach the credibility of the secretary of the defendant.

The testimony of Brewer, although of a negative character, cannot be reasonably reconciled with the testimony of the defendant. In the interview between the complainant, the defendant and Brewer, if the complainant had made the admissions which the defendant says he made, it is difficult to understand how Brewer would fail to remember the incident; especially in view of the fact that the interview was held for the purpose of questioning the complainant about the $7,000.

Counsel for the defendant contend further that "the failure of the complainant to call the elder Buntes and especially Gustave Bunte when upon the stand, relative to his claim that the $7,000 was a surprise and a pure gratuity, raises the presumption that their testimony upon this point would have been unfavorable to him."

The "elder Buntes" were Frederic and Gustave Bunte, the founders of the business and the chief stockholders of the business. The evidence shows that Frederic Bunte died before the conclusion of the taking of testimony before the Master. Gustave Bunte testified on behalf of the complainant but was not questioned by either party in reference to the payment of the $7,000 to the complainant. When Gustave Bunte was on the stand the defendant could have made him a witness for the defendant, and could have interrogated him in regard to the payment of the $7,000. In the circumstances we do not think that the presumption should be indulged that if Gustave Bunte had testified in regard to the payment of the $7,000, his testimony would have been unfavorable to the complainant.

The proof is substantially as follows;

"If a party fails to produce proof apparently within

The proof is substantially as follows:

his power, and which naturally would be offered by him, this is liable to produce an inference in the minds of the jury that the proof is not offered because it would be unfavorable to him; and sometimes it raises a strong presumption of law against him. *** Such does not arise unless the party wilfully withholds such evidence. *** The rule does not apply where the omission is to call a witness who might equally well have been called by the other party." Village of Princeville v. Hitchcock, 161 Ill. App. 588, 591.

After a careful consideration of all of the evidence in the case at bar, we are of the opinion that the evidence does not show that the $7,000, which the complainant received from the Buntes, had been previously solicited by him, or was paid to him pursuant to any agreement, or understanding with the Buntes. We think that the $7,000 was given to the complainant by the Buntes as a gratuity. We are strengthened in this conclusion by the conduct of the complainant throughout the entire negotiations. There is not a single act or circumstance in the evidence which would indicate, or even remotely suggest, that the complainant was favoring the Buntes in the negotiations. On the contrary his conduct shows an earnest, faithful solicitude to secure the best possible terms for his business associates, including the defendant. The conduct of the complainant tends strongly to negative the idea that he had any understanding or agreement with the Buntes that he was to receive compensation from them.

It is further maintained by counsel for the defendant as an independent ground for reversal, that "apart from the principle which forfeits" the complainant's "compensation, he cannot maintain this bill, because he was confessedly seeking money from the Buntes and so does not come into court with clean hands."

It is apparent that counsel for the defendant are basing their contention on the same acts of solicitation by the complainant which they have previously argued were acts of disloyalty. The implication of their argument is that, even if those acts are not sufficiently culpable to come within the rule governing disloyalty, nevertheless they come within the doctrine of "unclean hands." Such argument proceeds on the assumption that the acts are wrongful. Since we have held that the acts are not wrongful in a sense in which the law will take cognizance, it follows that the doctrine of unclean hands does not apply.

For the reasons stated the decree of the Circuit court is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

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THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

SIDNEY SPIELMAN and ARTHUR LORENZ,
Plaintiffs in Error.

236 I.A. 637

ERROR TO CRIMINAL COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

The defendant, Arthur Lorenz, was found guilty by a jury in the Criminal court of Cook County, Illinois, of criminal libel, and was sentenced by the court to serve six months in the House of Correction and to pay a fine of $1.00 and costs. He was jointly indicted with Sidney Spielman under Section 177 of Division I, Chapter 38 of the Criminal Code, which is as follows:

> "A libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury."

Sidney Spielman was not apprehended.

There were three counts in the indictment. A nolle prosequi was entered as to the third count. The first count charges, in substance, as follows:

> "That one Sidney Spielman, otherwise called Sidney Spillman, and one Arthur Lorenz, late of the County of Cook, on the thirteenth day of December in the year of our Lord one thousand nine hundred and twenty-one in said County of Cook, in the State of Illinois, aforesaid, contriving and intending to vilify and defame the members of The American Legion, a corporation, and to bring them into public scandal and disgrace, and to injure and aggrieve the said members of The American Legion, a corporation, and to impeach the honesty, integrity, virtue and reputation of them, the said members of The American Legion, and to publish the natural defects of the said members of The American Legion, a corporation, and thereby expose them, the said members of The American Legion, a corporation, to public hatred, contempt, ridicule and financial injury, unlawfully, maliciously and wilfully did compose and publish and cause and procure to be published a certain false, scandalous and malicious and defamatory libel of and concerning

the said members of The American Legion, a corporation, as aforesaid, and caused and procured the said false and scandalous, malicious and defamatory libel to be printed in a certain newspaper called 'Staats Zeitung,' with intent to circulate and publish the same, and afterwards, to-wit, on the said thirteenth day of December in the year of our Lord one thousand nine hundred and twenty one did unlawfully, maliciously and wilfully, in said County of Cook and State of Illinois, circulate and publish the said false, malicious, scandalous and defamatory libel of and concerning the said members of The American Legion, a corporation, so printed as aforesaid in the said newspaper called 'Staats Zeitung,' which false, scandalous, malicious and defamatory libel of and concerning the said members of The American Legion, a corporation, so printed, circulated and published in the said County of Cook and State of Illinois, in the German language, is in words and figures following, to-wit:" The article is here set out in full.

The second count of the indictment is the same as the first count with the exception that it charges that the defendant libeled Reed O. Landis, James C. Russell, and others, naming them; all of those named being members of The American Legion, a corporation.

It is admitted by counsel for the defendant that the defendant was "the editor who composed and published the article in the "Staats Zeitung." No evidence was offered by the defendant, with the exception of one witness, who merely testified in regard to the translation of the article into English.

The errors assigned by the defendant for reversal relate only to the sufficiency of the indictment.

Counsel for the defendant contend that the indictment is fatally defective because it does not contain either an inducement, an innuendo, or a colloquium.

In our opinion the indictment does contain a colloquium. The indictment expressly charges that the defendant "unlawfully, maliciously and wilfully did compose and publish and cause and procure to be published a certain false, scandalous and maliciously and defamatory libel of and concerning the said members of The American Legion, a corporation."

According to Bishop, a colloquium is properly alleged when the indictment avers "either in terms or by their equivalent, that the libelous words were 'of and concerning' the defamed person." (2 Bishop on Criminal Procedure, section 785, p. 372, 3rd ed.) "The colloquium," says the Supreme Court of this state in the case of McLaughlin v. Fisher, 136 Ill. 111, 117, "is to connect the words spoken with the plaintiff, and with the extrinsic matters, if any, set forth by way of inducement."

The indictment does not contain either an inducement or an innuendo. But we are of the opinion that the article is libelous per se, and in such case no inducement or innuendo is necessary. Blum v. Badger, 23 Ill. 445 (orig. ed. p. 498), 448; Campbell v. The Masonic Pub. Co., 214 Ill. App. 601, 605; Bunner v. Evening American Pub. Co., 173 Ill. App. 416, 420.

The article is lengthy and we shall not set it out in full, but some of the defamatory language is as follows:

> "The American Legion, this instrument bought with British money to suppress the truth, to gag freedom of conscience, to beat down every free expression of opinion, to betray organized American labor - this American Legion demands the scalp of Police Commissioner Miller of St. Louis. Mr. Miller has in plain terms given expression to a naked truth, in that he has established the fact that the number of crimes in America show an actually fearful increase, and that the second place, 85 per cent. of all crimes must be attributed to the war veterans. * * * The American Legion, as you know, goes about peddling the claim that it embodies the cream of the nation. It tries to make people believe that in itself the best and noblest elements of the American people are united. Patriotism and love of country, and, what is herewith combined, unselfish devotion to its American fellow citizens belongs to its copyhold, and its American native country owes it a special reverence, because it so spontaneously sprang to her defense. That is, of course, an audacious lie. Those who in the year 1917 (as already previously in the years of American neutrality) voluntarily took up arms, were quite other than the cream. They were simply the refuse of the nation. Those who really had adopted the trade of war as a means of making a living were indeed the best amongst them. And they were, almost without exception, tramps, vagabonds and bums who did not make any specially brilliant guard for the starry banner. With them stood the many, altogether too many, who already had worn the prison stripes, and for whom the army was far less an opportunity to rehabilitate their civil honor, than it was to evade the Spanish

> curtains. Somewhat of this caliber were the overwhelming majority of the American Volunteers of the year 1917, who, according to the tradition of the past decades, undeniably placed the American uniform only a shade higher than the garb of the prison house. *** The wearers of the uniform, once arrayed against the Huns and barbarians are to-day waging war against justice and law in America. *** The American Legion may scold and drivel ever so much, its patent patriots are today a crone for America."

The Supreme Court of this state in the case of McLaughlin v. Fisher, supra, has defined an innuendo as follows: (p. 116) "An innuendo is properly used to point the meaning of the words alleged to have been spoken, in view of the occasion and circumstances, whether appearing in the words themselves or extraneous prefatory matters alleged in the declaration. It is explanatory of the subject matter sufficiently already stated.***"

An inducement has been defined by the Supreme Court of this state in the case of McLaughlin v. Fisher, supra, as follows (p. 117): "The office of the inducement is to narrate the extrinsic circumstances which, coupled with the language published, affect its construction and render it actionable, when, standing alone and not thus explained, the language would appear not to concern the plaintiff, or, if concerning him, not to affect him injuriously. *** If, therefore, the words alleged to have been spoken are not slanderous per se, or if they do not refer to the plaintiff, or if they require explanation by some extrinsic matter to render them actionable, such extrinsic facts must be alleged by way of inducement, and thus render the charge intelligible and certain."

We think that it is obvious that no innuendo is necessary to "point the meaning of the words" in the article; and that no inducement is needed to "narrate the extrinsic circumstances which, coupled with the language published, affect its construction and render it actionable." The intent and meaning of the language used in the article require no explanation whatever to render the

language intelligible and certain. The article shows on its face a deliberate, malicious purpose to "impeach the honesty, virtue and reputation" of the members of the American Legion, and to expose them to "public hatred, contempt and ridicule" within the meaning of the statute. The established rule in this state is that "the words in an action of libel must be taken in the sense which the readers of common and reasonable understanding would ascribe to them, - that is, in their ordinary or common acceptation." The People v. Fuller, 238 Ill., 116, 124. When so construed the article is clearly libelous per se, and, therefore, neither an inducement nor an innuendo is necessary in the indictment.

Counsel for the defendant make the following specific contentions:

> "The indictment is fatally defective, because it does not contain an inducement as to the incorporation of the American Legion; and as to its aims and objects; and as to the membership of the American Legion; and as to its memberships' enlistments in the standing army during the year 1917, and prior thereto; and as to their membership in the standing army during 1917, and prior thereto; and as to their volunteering for service in the recent war; and as to their participation in the recent war; and as to the particular acts of the members of the American Legion, in connection with the recent war, if any, which the article is charged to have libeled; and as to the good character of the members of the American Legion; and as to the innocence of the members of the American Legion of the offense imputed, if any, by the article; and of the honesty, integrity, virtue, or reputation, and as to the natural defects, or the lack of them, of the members of the American Legion; and as to the business, profession or occupation of the members of the American Legion; and as to charging the application of the article in question to members of the American Legion who were alive."

In regard to the contention that the indictment should contain an averment "charging the application of the article in question to members of the American Legion who were alive," we have previously pointed out that the indictment alleges that the defendant published the libelous matter "of and concerning" the members of the American Legion.

The other matters which counsel for the defendant main-

tain should be specifically averred in the indictment by way of inducement, need not, in our opinion, be alleged. These matters, if alleged by way of inducement, would merely tend to show more clearly that the members of the American Legion had been criminally libeled, since the only purpose of an inducement is to explain by extrinsic facts and circumstances the meaning of an alleged libel. But we have held that the article itself is plainly libelous per se, without any explanations. If the meaning of the article is plain per se, it would be superfluous to add anything further to make the meaning still more plain.

In regard to the matters about which counsel for the defendant contend specific averments should be made, if the averments were in substance that the aims of the American Legion were patriotic, that the members of the Legion were brave, honest, with good war records, engaged in respectable occupations, and innocent of the charges imputed to them, such averments would only emphasize and make more evident the libel. The effect of such averments also would be to anticipate the defense that the libel was true, and to allege by implication the falsity of the libel. But the truth may be pleaded as a defense in this state; and it has been held that in such case the indictment need not allege the falsity of the libel. State v. Fosburgh, 32 S. D. 370, 375.

A further contention of counsel for the defendant is that "a libel against a corporation cannot be taken advantage of by the individual members thereof."

That question does not arise in the case at bar. The prosecution doesnot proceed on the theory of a libel against the American Legion as a corporation, but it is based on the assumption that the members of the American Legion were libeled. The indictment alleges explicitly that the article libeled "the members" of the American Legion.

It is further contended by counsel for the defendant

that "An article referring generally to a class of persons cannot libel one or more individuals of said class."

Counsel for the defendant state that as far as they have been able to ascertain, this question has never been decided in Illinois. It may be that the question has not been adjudicated in this State, but it has been decided adversely to counsel for the defendant by courts of other jurisdictions in carefully considered opinions.

In the case of Palmer v. Concord, 48 N. H. 211, in which a newspaper article charging the Union Army with cowardice during the Civil war was held to be prima facie libelous, the court said (p. 215): "As these charges were made against a body of men, without specifying individuals, it may be that no individual soldier could have maintained a private action therefor. But the question whether the publication might not afford ground for a public prosecution is entirely different. Civil suits for libel are maintainable only on the ground that the plaintiff has individually suffered damage. Indictments for libel are sustained principally because the publication of a libel tends to a breach of the peace, and thus to the disturbance of society at large. It is obvious that a libellous attack on a body of men, though no individuals be pointed out, may tend as much, or more, to create public disturbances as an attack on one individual; and a doubt has been suggested whether 'the fact of numbers defamed does not add to the enormity of the act.'"

In the case of People v. Turner, 28 Cal. App. 766, the court held that a newspaper article which charged the prosecuting witnesses, who were members of the Fourth Degree of the fraternal organization known as the Knights of Columbus, with the taking of an oath which would be in itself a violation of their allegiance and of the essential duties and bonds of American citizenship, was criminally

libelous. The court said (p. 771): "At the time of the publication of the article in question it appears from the record that there was a political campaign in progress in Santa Cruz County, where the article was published; and perhaps it is fair to infer from the record that some of the candidates for election were members of the Fourth Degree of Knights of Columbus, but none of the prosecuting witnesses were such candidates. With the record in that condition defendant contends, first, that the publication was not of and concerning the prosecuting witnesses; and, secondly, that the alleged libelous matter applies to a class or generally to all of the members of the Fourth Degree in the fraternal order mentioned, and therefore has no individual application, and that for these reasons the judgment of conviction cannot stand. While the published matter may have been intended to apply only to persons who were candidates for office at that election, nevertheless in terms and in effect it refers to each and every member of the order of the degree named. It is undisputed that the publication was false, that the prosecuting witnesses were members of the society of the degree in question, and the inevitable conclusion to be drawn from the article is that every member of the order of the fourth degree has taken and subscribed to the published oath. The article asperses the character of such members and ascribes to them base and dishonest motives, and as to them its publication constituted criminal libel whether at that time a candidate for public office or not. The points presented by defendant might be urged with some force in a civil action in mitigation of damages, but we do not believe they are good in a criminal prosecution for libel."

In the case of Grane v. State, 14 Okla. Crim. 30, which is similar to the case of Peeple v. Turner, supra, the court held that an information was sufficient which charged the defendant with printing and circulating a book containing libelous matter against

the members of the Fourth Degree of the Knights of Columbus. The court said (pp. 40, 49): "Here the injured parties belonged to the Fourth Degree Knights of Columbus, and the libelous matter applied to each member of that organization and excepted none.*** The law is intended to and does protect the self-respecting, law-abiding citizen against these calumnies, whether made against an individual specifically or a class of individuals."

In the case of The State v. Brady, 44 Kans. 435, which was a prosecution for criminal libel, the court said (pp.437): "In this case the alleged libel charged that Governor Harvey had pardoned his own brother out of the penitentiary; that the convict Harvey had been sent to Lansing from Salina. This was certainly charging that one of the Harvey brothers had been convicted of a felony. *** The appellant contends that the statement published referred to no particular one of the Harvey family as having been a prison convict. While this objection might be urged with some force in a civil suit for damages, we do not think it is good in a criminal prosecution for libel. The law is elementary that a libel need not be on a particular person, but may be upon a family or a class of persons, if the tendency of the publication is to stir up riot and disorder, and incite to a breach of the peace."

In Jones v. The State, 38 Tex. Crim. 364, in which an indictment charged that the defendant criminally libeled the street car conductors of Galveston, the sufficiency of the indictment was questioned on the ground that the indictment referred only to one conductor and failed to designate by name that conductor. The court said (p. 367): "By reference to the libelous matter published, it will be seen that the first sentence in said publication refers to the conductors on the various street cars of this city (meaning the City of Galveston) as a class. The libelous matter makes no exception among the conductors, but includes them

all. This has been held sufficient, without designating the names; and we hold this to be sufficient designation of every conductor in the service of said railroad company at the time of said publication. It therefore would be a violation of our statute to libel any sect, company or class of men without naming any person in particular who may belong to said class."

Bishop says: "It is not necessary that the persons against whom a libel is directed be specified. It is sufficient that it is directed against a class. The conductors of a street car line against whom intemperate charges are made, the members of a family against whom it is charged that one of their number has been in the penitentiary, and the fourth degree Knights of Columbus of a certain locality charged with having subscribed to a treasonable oath are examples of such classes." 2 Bishop on Criminal Law, sec. 908, p. 587 (9th ed.)

On the principles announcedin the authorities which we have just cited, we are of the opinion that both counts of the indictment in the case at bar are valid, although the first count refers generally to the members of the American Legion, without naming any of the individual members. It is not necessary in order to maintain the present prosecution for criminal libel that the libelous matter should refer to any specific member of the American Legion. It is sufficient that the libel is defamatory of all of the members of the Legion.

Counsel for the defendant argue with a great deal of earnestness that "the case at bar presents for the first time to the jurists of this commonwealth the plea that freedom of the press be still further curtailed to include within its confines attacks upon groups and classes where no individual is singled out for criticism, and the issue here presented is of so momentous and far-reaching a character that it involves, in reality, a basic

principle of government itself."

Counsel for the defendant further argue as follows: "If this judgment be sustained, one's imagination would not be too far afield if one could see in the future our jails inhabited by some very respectable citizens, put there because they may have had the temerity to criticise one of the numerous groups, and thereby offend some individual of such group. *** The adoption of such a repressive rule of law would be monstrous. *** A thousand times better that an occasional Lorenz should overstep the bounds of propriety by heated, intemperate remarks against a large body than that the principle be established by the Appellate Court in this progressive State of Illinois that from now on criticism of a class is on a parity with criticism of the individual."

We think that counsel for the defendant are unduly alarmed. The rule that a group or class may be libeled as well as an individual, does not unreasonably abridge the freedom of the press. The same principle which causes the State to intervene in the case of a libel against an individual applies logically to a libel of a class or group. The primary purpose of State intervention is not to protect the individual from libelous attacks, but to prevent breaches of the peace which may be provoked by the libelous attacks. (25 Cyc. p. 567.)

Bishop says: "The common tendency of a libel, to which the books oftener allude than to any other, is to create breaches of the peace. This is said to be the principal ground on which libels against individuals are indictable." (2 Bishop on Criminal Law, sec. 909, p. 687, 9th ed.)

Again Bishop says: "In libel and slander where commonly there is a sort of an attempt to harm the reputation, the indictability of the act does not come from such harm. If we accept as sound the language of the books, it does not proceed there-

principle of government itself."

Counsel for the defendant further argue as follows:

"If this judgment be sustained, one's imagination would not be too far afield if one would see in the future our jails inhabited by some very unsuspecting citizens, and there because they may have had the temerity to criticize one of the numerous groups, and thereby affect some individual of such group. *** The adoption of such a repressive rule of law would be dangerous. *** A thousand times better that an occasional lawsuit should overstep the bounds of propriety by resort. Intemperate speech against a race only than that the principle be established by the Appellate Court in this progressive State of Illinois that from now on criticism of a class be on a parity with criticism of the individual."

We think that counsel for the defendant are unduly alarmed. The rule that a group or class may be libeled as well as individuals, does not necessarily abridge the freedom of the press. The same principle which causes the State to intervene in the case of a libel against an individual applies equally to a libel of a class or group. The primary purpose of State intervention is not to protect the individual from libelous attacks, but to prevent breaches of the peace which may be provoked by the libelous attacks. (33 Cyc. p. 907.)

Bishop says: "The natural tendency of a libel, to which the basis offence alike [illegible] in all places, is to promote breaches of the peace. This is said to be the principal ground on which libels against individuals are indictable." (2 Bishop on Criminal Law, sec. 909, p. 496, 8th ed.)

Again Bishop says: "In libel and slander there commonly comes in a case [illegible] [illegible] [illegible]

from t. any degree. For the courts whether correctly or not in principle, hold these wrongs to be punishable, not because of injury to the reputation, but of their tendency to create breaches of the peace. 1 Bishop on Criminal Law, sec. 501, p. 430 (9th ed.)

It is obvious, we think, that a libel against a class or group would be just as likely, if not more likely, to cause a breach of the peace as would a libel against an individual.

A further answer to the contention of counsel for the defendant that the rule which holds that a class or group may be libeled would curtail freedom of the press, is that the constitution of this State has expressly provided against such a contingency by allowing the truth, when published with good motives and for justifiable ends, to be pleaded as a defense in libel. Section 4, Article 3 of the constitution, after providing that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty," further expressly provides that "in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."

The defendant had the right to avail himself of this constitutional provision but he did not see fit to do so.

No possible good motives could have actuated the defendant to publish such grossly abusive language in regard to the members of the American Legion. No justifiable ends could have prompted him to make such a scurrilous attack on the members of the Legion. No public benefit could result from the act of the defendant.

It is evident that the defendant did not publish the article in good faith as a public spirited citizen for the purpose of remedying some wrong or calling the attention of the public to

[illegible] Digest. But the courts [illegible] criminally, [illegible] of their tendency to provoke breaches of the peace. 1 Bishop on Criminal Law, 9th ed., sec. [illegible]

It is obvious, we think, that a libel against a class of group would be just as likely, if not more likely, to cause a breach of the peace as would a libel against an individual.

A further answer to the contention of counsel for the defendant that the rule which holds that a class or group may be libeled would prevent discussion of the group, is that the constitution of this State has expressly provided against such a contingency by allowing the truth, when published with good motives and for justifiable ends, to be pleaded as a defense to libel. Section 4, article 2 of the constitution, after providing that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty," further expressly provides that "in all trials for libels, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."

The defendant had the right to avail himself of this constitutional defense but he did not see fit to do so.

No possible good motives could have actuated the defendant to publish such grossly obscene language in regard to the members of the Negro race. No justifiable ends could have prompted him to make such scurrilous attacks on the members of the Negro race. No public benefit could result from the act of the defendant.

It is argued that [illegible]

some abuse. The article was written in a spirit of vindictiveness and obviously was intended as a gratuitous insult to the members of the American Legion.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McGurvey, P. J., and Matchett, J., concur.

205 - 28362

L. A. HEDDEN,
Appellee,

vs.

NEW YORK SUPPLY & MACHINERY CO.,
a Corporation,
Appellant.

236 I.A. 637
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action in the Municipal court of the City of Chicago on a promissory note, brought by the plaintiff, L. A. Hedden, against the defendant, the New York Supply & Machinery Company. The note was one of ten notes which were made by the defendant and which were delivered at the same time to a company by the name of the Julian Trade Finance Company. No payee was named in the notes, but the place for the name of the payee was left blank. A manufacturing company by the name of the Safety Sled Company obtained the note in question, together with one other of the ten notes, from the Julian Trade Finance Company; and the plaintiff obtained the note from the Safety Sled Company.

The principal defenses relied on by the defendant are as follows: First, that in accordance with an agreement between the defendant and the Julian Trade Finance Company, the Julian Trade Finance Company was to hold the notes, including the note sued on, in the office of the company and not to dispose of them in any manner until the Julian Trade Finance Company delivered to the defendant an equivalent amount of negotiable paper acceptable to the defendant; that when the Julian Trade Finance Company delivered the defendant's notes to the Safety Sled Company, the Julian Trade Finance Company informed the Safety Sled Company of the conditions on which the Julian Trade Finance Company had acquired the notes; second, that since there was no payee named in

[illegible]

298 I.A. 697

L. A. [illegible],
Appellee,

vs.

NEW YORK SUPPLY & MACHINERY CO.,
a Corporation,
Appellant.

MR. [illegible] delivered the opinion of the court.

This is an action in the Municipal court of the City of Chicago on a promissory note, brought by the plaintiff, L. A. [illegible], against the defendant, the New York Supply & Machinery Company. The note was one of ten notes which were made by the defendant and which were delivered at the same time to a company by the name of the Fulton Trade Finance Company. No payee was named in the notes, but the place for the name of the payee was left blank. A manufacturing company by the name of the Safety Bind Company obtained the note in question, together with the other of the ten notes, from the Fulton Trade Finance Company; and the plaintiff obtained the note from the Safety Bind Company.

The principal defenses relied on by the defendant are as follows: First, that in accordance with an agreement between the defendant and the Fulton Trade Finance Company, the Fulton Trade Finance Company was to hold the notes [illegible], the notes [illegible] in the office of the company and not to dispose of them in any manner until the Fulton Trade Finance Company delivered to the defendant an equivalent amount of negotiable paper acceptable to the defendant; that when the Fulton Trade Finance Company delivered the defendant's notes to the Safety Bind Company, the Fulton Trade Finance Company informed the Safety Bind Company of the conditions on which the Fulton Trade Finance Company had received the notes; second, that since there was no payee named in

the notes when they were delivered to the Julian Trade Finance Company, the place for the name of the payee being left blank, the notes were incomplete and not negotiable.

The only evidence in regard to the conditions on which the notes were delivered to the Julian Trade Finance Company was the testimony of the president of defendant. Charles White, a note broker, who operated under the name of Julian Trade Finance Company, testified in reference to receiving the notes but did not testify as to the conditions on which they were received.

Counsel for the plaintiff state that the testimony of the president of the defendant is not adequately abstracted and they have filed a supplemental abstract. In considering the testimony of the president of the defendant we have examined the record. The defendant's president testified that he received a letter from A. D. Merker of the Julian Trade Finance Company, asking "if I needed any money;" that after he got the letter he went to see Merker and "asked him what his proposition was;" that Merker told him to make out a series of ten notes, "leaving the names in blank, just sign them, to the total of $15,000;" that he, Merker, said that he would send the notes on to New York and would give him, the president of the defendant, "other notes equivalent to that amount which will be negotiable and will be approved, whether I want to accept them or not;" that "if I don't want to accept them he will return me my notes back; otherwise he will keep them in trust until I get my notes."

On the question whether he ever received any notes from the Julian Trade Finance Company in exchange for the notes he delivered to that company, the testimony of defendant's president is confused and indefinite. The purport of his testimony is that he received three or four notes from the Julian Trade Finance Company, but that they did not "total in amount anywhere near $15,000;" that he immediately returned the notes to the Julian Trade Finance Company.

On the issue whether the Safety Sled Company was informed by the Julian Trade Finance Company of the conditions on which the defendant delivered the notes, including the one in controversy, to the Julian Trade Finance Company, the defendant's president did not testify. The only witness who testified in the defendant's behalf on this issue was Charles White, the note broker who operated under the trade name of the Julian Trade Finance Company. White testified that when he delivered the notes to the Safety Sled Company he did not say anything about the manner in which he had acquired them; and did not say anything about the consideration that was paid to the defendant for the notes.

The plaintiff testified that when he received the note from the Safety Sled Company he "did not have any notice or information to the effect" that the defendant "had received no consideration" for the note; and that he did not "know anything about how" this note "got into the possession of the Safety Sled Company."

Frank Bornquist, "proprietor" of the Safety Sled Company, testified that when he received the note in question he did not know anything about the way in which the note got into the hands of the Julian Trade Finance Company; and that he did not know that the defendant "had issued the note without consideration."

The evidence shows that the Safety Sled Company obtained the note from the Julian Trade Finance Company before maturity and for a valuable consideration. The evidence also shows that the plaintiff acquired the note from the Safety Sled Company before maturity and for a valuable consideration.

We are of the opinion that even though the note was delivered by the defendant to the Julian Trade Finance Company on the conditions stated by the defendant, since the plaintiff had no knowledge of those conditions, and since he obtained the note before maturity and for a valuable consideration, the plaintiff is an innocent

[illegible] On the [illegible] when the Safety Glad Company was [illegible] by the Fulton Trade Finance Company of the conditions on which the defendant delivered the notes, declaring the one in controversy, to the Fulton Trade Finance Company, the president's [illegible] the sole testify. The only witness who testified in the defendant's behalf on this issue was Edward M. Fulton, who was brought who operated under the trade name of the Fulton Trade Finance Company. Fulton testified that when he delivered the notes to the Safety Glad Company he did not say anything about the account in which he had acquired them; and did not say anything about the consideration that was paid to the defendant for the notes.

The plaintiff testified that when he received the notes from the Safety Glad Company he did not have any notice or information to the effect that the transfer had occurred in "questionable" or "[illegible]" and he [illegible] anything about "[illegible] the [illegible] of the Safety Glad Company."

Fred Fernald, President of the Safety Glad Company, testified that when he received the note in question he did not have anything about the way in which the note got into the hands of the Fulton Trade Finance Company, and that he did not know that the defendant had issued the note without consideration."

The evidence shows that the Safety Glad Company obtained the note from the Fulton Trade Finance Company before maturity and for a valuable consideration. The evidence also shows that the plaintiff acquired the note from the Safety Glad Company before maturity and for a valuable consideration.

The use of the capital letter when though the notes were delivered by the defendant to the Fulton Trade Finance Company on the conditions stated by the Safe Body Glad Company "[illegible]" and in ignorance of those conditions, and there is evidence the note [illegible]

holder of the note.

We are further of the opinion that the omission of the name of the payee in the note did not affect the negotiability of the note. Weston v. Myers, 33 Ill. 424, 433.

"That the omission to insert in an instrument the name of a payee is not a feature or a defect which affects negotiability seems to be well settled by authority. The effect of the omission to name a payee is to invest any bona fide holder with the authority to fill the blank left for that purpose by the drawer or maker." 3 R.C.L., p. 881.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

[illegible] of the [illegible]

[illegible]

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236 - 28894

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|---|---|
| JOSEPHINE KAUMANNS, Appellee, vs. NORTHWESTERN ELEVATED RAILROAD COMPANY, a Corporation, Appellant. | 236 I.A. 637 APPEAL FROM SUPERIOR COURT OF COOK COUNTY. |

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, the Northwestern Elevated Railroad Company, from a judgment on a verdict of $4,000 in favor of the plaintiff in an action brought by the plaintiff to recover damages for injuries alleged to have been received by the plaintiff from an electric shock while the plaintiff was a passenger on one of the trains of the defendant.

The accident in which the plaintiff alleges she received the injuries occurred in the city of Chicago near Lawrence avenue. The motive power of the trains of the defendant was electricity. At the time the accident is alleged to have happened the trains were operated by the trolley system north of Lawrence avenue and by the third rail system south of Lawrence avenue. The motive power was changed from the trolley to the third rail by means of a switchboard in a cabinet located in the rear of the car. A brass handlebar was attached perpendicularly to the cabinet. The cabinet contained a slate base approximately 1 1/8 of an inch thick on which was arranged a "knife switch" controlling the heater circuit and light circuit; a "knife switch" controlling the operation of the air compression on the car; and one "snap switch" controlling the light circuit of the car. The voltage used by the defendant varies between 550 and 625 volts at different points on the road. Near the place of the accident the voltage was between

600 and 625 volts.

The plaintiff was sitting near the cabinet box. Underneath the seat on which the plaintiff was sitting there was a circular drum, or cast iron tank, known as a "pig;" and there was also a heater under the seat. The evidence relating to the manner in which the plaintiff is alleged to have received the electric shock rests on the testimony of the plaintiff alone.

In view of the fact that counsel for the defendant contend with so much confidence that the plaintiff was not shocked and was not injured, that the physical facts conclusively show that it was impossible for the plaintiff to have received a shock, we shall set out the evidence at length on the question of the shock and the injuries.

The testimony of the plaintiff is substantially as follows: That before the accident her health was "just as fine as could be;" that she had never been under a doctor's care except at the birth of her children; that on October 28, 1920, she left her house about eleven o'clock in the morning to go to her husband's office in the Isabella building on Van Buren street near State street; that she boarded the car at Jarvis street; that before leaving her home she had walked in the grass and that her shoes were damp; that the day was a misty and foggy day; that the sun was not shining; that when she got on the car she sat on the east side of the car, on one of the long side seats in the rear of the car; that she sat directly in the corner and hooked her finger in the brass handlebar in order to be real comfortable; that her back was partly to the window and partly to the partition in which she thinks there were switches; that she put her feet against the radiator down in the bottom of the car; that she was sitting there reading her newspaper and paying no attention to anything else; that suddenly she heard a sharp hiss and instantly felt as if a

hot iron went through her body; that she felt pins and needles all through her; that she "couldn't get this arm that had this bar -;" that it just twisted her around "like this," - illustrating; that she had a peculiar taste in her mouth; that when she put her finger in her mouth she thought all the fillings of her teeth had come out; that she had a metallic taste in her mouth just like brass or some kind of metal; that she could not do anything; that her right side was just lifeless, and that she could not feel anything at all; that when the conductor saw her crying he said, "What is the matter? Did you get an electric shock, lady?" and that she said no - "I am hurt;" that she does not recall exactly what else she told him because she was not very conscious otherwise; that she tumbled over to the other seat and had a good cry because it relieved her a bit; that two ladies sitting over in the other seat asked what was the matter and comforted her; that she remained on that side of the car, the west side; that when she reached the loop a man helped her out of the car and to her husband's office; that she had no pains; that she "just felt like" she "wasn't here at all, the right half of" her "body;" that she got off the train at Van Buren and State streets; that a man helped her and carried her; that he took hold of her left side and that she just tried to walk but that she dragged her right foot behind because she could not walk straight; that the men assisted her to the building and to the elevator; that somebody else, she does not know who, helped her into her husband's office; that she "felt lifeless, like she was dead;" that "they brought me down to the doctor's office and gave me a stimulant and massaged me;" that she was in the doctor's office about fifteen minutes and then her husband "almost carried" her "up to his office;" that "a Dr. Sweeney sent by the Elevated" came and massaged her and took hold of her arm and told her "to

keep on that way" - illustrating; that she told him "he shouldn't do it, but he said I had to on account of getting circulation in that arm;" that she had no pain in the arm or feeling at all; that she just felt numb and dead; that Dr. Sweeney took her knee and tried to get a reflex; that she was in her husband's office about an hour; that she just sat there "resting and crying and feeling miserable;" that after that a friend of her husband took her home in his machine; that when she reached home she stopped a minute at a neighbor's door and then went on home and laid down right away; that her mother and children were at the house; that that evening after office hours Dr. Strauch came; that he massaged her, gave her some liniment and told her to keep on massaging that whole side; that he ordered her to get an electric vibrator; that she massaged her with his hands, her whole right side and arm; that that same night she secured a vibrator at the drug store; that her husband used it three or four hours in succession; that she did not feel much sensation at all; that she could move her fingers a little bit and it did not hurt so much, but that when she wanted to bend her "hand and arm it hurt" her "all the way up and the sensation was terrible;" that at this time she was in the family way and had been that way about two and one-half months; that the doctor asked her about that in the afternoon and that she told him right away; that when the doctor came she was undressed but was lying on a couch and not in bed; that during the night about eleven o'clock she got severe pains in her abdomen, and that she knew that she "could not have the baby any more;" that the pains she had were regular labor pains as in childbirth; that the pains continued during the night and lasted probably a day and a half; that she had a discharge and Dr. Strauch attended her during this time; that the miscarriage occurred on October 29; that the next morning her whole arm was swollen, starting up from the hand; that her hand was "pretty red;" that Dr. Strauch came that same day

and massaged her arm; that she got up the next morning for a few minutes and then went to bed; that her youngest baby at this time was about two and a half years old; that at this time nobody was living with her but her family; that prior to this time she did her own work except the laundry work; that the next morning her mother came to the house very early; that her mother is seventy-two years old; that her mother did everything that day and that she, the plaintiff, did nothing at all; that she was in bed about two and one-half days; that she did no work around the house; that she got up once in a while during the day; that her mother did the work; that her mother did not live with her but lived about five blocks away; that her mother came every day to help her; that she, the plaintiff, cleaned the baby's bottles and did things for her baby that nobody else could do, but that "any other things" her mother did; that after ten weeks she, the plaintiff, was "all right again as far as the first condition goes," but had to stay in bed; that she could not move her arm at all; that she carried her arm in a sling about three months, and did not use her arm "except the doctor told me to use it as much as I could;" that she did not use it in her household work; that she would just wash her fingers and hands and take hold of little things; that during that time Dr. Strauch was attending her; that she would see him at his office every week for treatment; that he gave her electric massage on the whole side; that when she raises her arm from a quarter to a half an are it pains her; that before the accident she did her own cooking and baking, washed the windows, scrubbed the kitchen, took care of the children, went swimming with the children, did the washing for the baby every day and everything that belongs to the housework; that she now she sweeps with her left hand and cleans the house as well as she can; that she takes care of the children and bakes;

that she irons with her electric iron; that she has never ironed with a hand iron after the accident, has never gone swimming, and has not washed any clothes; that she has not beaten any rug except with her left hand; that she received a slight electric shock before the accident from ironing or on the electric toaster, just a little tingling; that she had a child born to her in September following the accident; that she nursed the baby herself and about four days after the birth she noticed that she did not have much milk on her right side; that her breast would only fill up to about a quarter or a third the size of the left side; that the last time her right arm swelled up was the night before last; that she did just a little cooking and it became swollen; that she has had pain in the right arm all the time since the accident; that at the time of the accident she was thirty-three years of age.

James S. Helm testified in substance on behalf of the plaintiff, that his business until a month before he testified was president of the William R. Hansen-Bennett Magazine Agency; that at the time of the trial he had no business excepting investing what funds he had; that he was a passenger on the car in which the plaintiff was riding; that he was seated on the east side of the car, the same side the plaintiff was on; that he was sitting on the long seat about three or four feet from the plaintiff; that he heard the plaintiff make some exclamation like, "Ouch, I have been hurt;" that the exclamation was loud; that after he heard this outcry and a few seconds had elapsed he looked up again and saw the plaintiff seated on the opposite side of the car; that she seemed to be in pain and was crying; that her face was distorted some and she seemed excited; that this conditioned continued for several seconds; that he secured information about the number of the car, the time and the line from the conductor or the motorman, and wrote the information together with the names of two witnesses ---- which he gave to the plaintiff; that he left the car at

the Quincy street station, and that the plaintiff was still on the car; that he thinks she was still crying and talking to people on either side of her; that he has "a faint recollection" of the guard saying something but does not remember what he said; that he has "a faint recollection" of the plaintiff talking to someone there, a motorman or conductor, but that he does not remember the conversation.

Gertrude Sheldon, a witness on behalf of the plaintiff, testified that she was a passenger on the car in which the plaintiff was riding; that she did not know the plaintiff; that she, the witness, was sitting on the west side of the car on one of the long seats and that the plaintiff was on the east side of the car in the corner; that the plaintiff "kind of staggered across the car;" that she did not walk straight across, but "kind of leaned over a bit and then sat down next to a friend of mine;" that the plaintiff "was weeping; she was not crying out;" that it was not the crying of the plaintiff that attracted her, the witness', attention, but it was the exclamation of the plaintiff, "Oh, I got a shock;" that she, the witness, did not see the plaintiff talk to any elevated employe or see any guard there; that she, the witness, does not remember of a guard talking to the plaintiff at Chicago avenue; that she, the witness, did not see anyone talking to the plaintiff except the man who took their names; that the only thing she, the witness, heard the plaintiff say was, "Oh, I had a shock;" that she, the witness, did not call the guard's attention to the plaintiff.

Oliver P. Laverty, on behalf of the plaintiff testified in substance that he was employed in the government railway mail service; that he boarded the train at Wilson avenue; that he was seated on one of the long seats on the east side of the car in which the plaintiff was riding; that when he entered the car there seemed to be a crowd around the door, and he pushed in and secured a seat;

that his attention was then attracted to a number of people standing in front of the opposite long seat; that they were standing with their backs to him; that he finally discovered that the plaintiff was seated "there sobbing and acting quite hysterical;" that just after he got on the car she said something to the guard about an electric shock she had received; that the guard said he had never heard of such a thing happening before; that he noticed the plaintiff all the way down to the loop and she was hysterical or practically so all the way down; that she was trembling all the time; that she had the appearance of her nerves being unstrung; that she was seated on the west side of the car; that she got a little more quiet as the train neared the loop, but not entirely composed; that he had expectedto get off the train at the LaSalle street station, but that he alighted at the State street station and assisted the plaintiff down to the sidewalk; that he walked beside her and put his hand under her arm to assist her; that she acted as though she was in pain; that she was in a hysterical condition; that he went with her to the door of the building in which she said her husband's office was located; that she walked along naturally but slowly; that he left her at the elevator.

Dr. August Strauch, on behalf of the plaintiff, testified in substance that he had known the plaintiff for nine or ten years; that he examined her on the evening of the accident; that she was in bed; that the plaintiff complained of intense pain in her right face, right arm and right chest; that she said her arm was paralyzed; that he raised the arm and it dropped back on the bed; that the sense of touch of the hand and face was very indistinct; that he examined her sensations for pain by using a needle and pricking the skin with her eyes bound and tied; that he was able to transfix the skin with a needle without any reaction on her side or any visible twitching; that there was no twitching or fugitive move-

ment or expression of the face; that by transfixing the skin he means that he pushed the point of the needle through a fold of the skin, so that the point came out on the other side; that he made the test especially on the right arm, neck and shoulder; that while he was doing this she was conscious; that she did not show any indication of pain; that he examined the reflexes; that the reflexes of the legs were normal, but that it was impossible to elicit reflexes on both arms - that the result was very doubtful; that he gave her bromides and ordered very gentle massage; that he gave her a massage himself; that later he prescribed an electric vibrator and massage; that he saw her the next day and her condition was practically the same as the day before; that he knew before the accident that she was in a delicate condition; that he was called up after midnight and told of intense pain in the back; that he saw her the next day; that she said she had very intense pain, which she termed labor pains; that he made no examination at that time as he "abstains in such a case;" that on the third day he saw a foetus; that it corresponded to a pregnancy of about two or two and one-half months; that after the first week and a half he saw her at intervals of every week to every two weeks, and finally once a month or so; that after that she came to his office and continued to do so until lately; that he gave her "vibration massage;" that then he did nothing except examine her and keep in contact with her; that he made about a dozen visits to her home; that she made about thirty visits to his office; that he does not remember telling a representative of the defendant that he would advise the family to settle , for the longer the case was drawn out the worse she will be, but that he would say that these cases are liable to get worse the longer they last; that there is no organic disturbance; that disturbances

due to some delicate injury to the nervous system could become aggravated after the supposed electric shock; that his opinion is that the disturbance does not always depend on the intensity of the current that goes to the body; that there might be severe disturbances with a mild current, most likely due to the terrific shock, the mental shock a person experiences by a high voltage current or by some lightning bolt, for instance; that the plaintiff was not a tempermental woman; that she was a normal woman; that there were no marks, bruises, burns or scorching of the flesh on her; that it is possible to have an electric shock without having any marks on the body; that he would not have suspected that she had received an electric shock unless she had told him about it; that the disturbances might be due to hysteria in a person who had a strong predisposition to an hysteria, but not in a person in a healthy condition; that the objective symptom that he saw was the swelling of the right arm the same evening of the accident and for a few days thereafter; that it then disappeared; that after an electric shock there is swelling due to the action on the blood vessels; that he does not claim to be an expert. He stated that in his opinion an electric shock could cause all of the injuries that he had found in his examination of the plaintiff; that he had no opinion as to whether these conditions would be permanent; that it is difficult to prognose the case; that it is difficuly to say whether they are permanent or not; that nobody can say; that it is possible that they may be permanent.

Mrs. M. E. Cartwright, a witness on behalf of the plaintiff, testified, substantially, that she lived in an apartment across the hall from the plaintiff; that she had known the plaintiff for about a year and a half before the accident; that the plaintiff was very healthy; that she saw the plaintiff the day

after the accident and that the plaintiff looked pale and her face was quite drawn; that she saw her about four days later and that she had her arm in a sling; that she saw her numerous times after that; that she saw her trying to beat an egg with her left hand; that she saw the plaintiff's mother doing most of the work.

Dr. Nathaniel N. Adams, a witness on behalf of the plaintiff, testified in substance that he examined the plaintiff at the request of counsel for the plaintiff on "last Saturday;" (the trial was had in February, 1923); that on making an examination of the plaintiff's body, particularly of the arms and legs, he found objectively that on the left hand the reaction to the electrical current he applied was quick and of full extent and of a degree that was normal; that when he applied the same amount of current to the right arm, the reaction was of a less degree; that there is a quarter of an inch of atrophy in the right arm; that there is a loss of sensation on the back of the right forearm, between the elbow and the shoulder; that he made various tests with cotton and a sharp knife and heat and cold; that there was no difference in the legs or body; that his diagnosis was that the nerves of the right arm were not functioning normally. He stated that in his opinion an electric shock might or could produce the condition complained of by the plaintiff; that there are a few other causes that would produce exactly the same conditions; that the condition of the right arm could not be caused simply by hysteria.

On behalf of the defendant Harry Keeley testified substantially that he was a trainman employed by the defendant; that he was on the train on which the plaintiff was a passenger; that he had a talk with the plaintiff between Lawrence avenue and Wilson avenue; that she was sitting on the side seat and was "looking funny and holding her arm;" that he said to her, "What is the

trouble, are you sick?" that she said, "What did you do?" that he replied, "I threw the switch from the trolley to the third rail;" that she said, "I think you did; I got a shock;" that he said to her, "You could not get a shock there; there is nothing there to give you a shock;" that that is all that took place between him and the plaintiff; that he got off the train at Wilson avenue and a man by the name of Ganley took his place; that when he was talking to the plaintiff he was holding onto the handlebar to steady himself and that he did not feel any electric current of any kind; that the train was at a full stop at Lawrence avenue when he pulled the trolley down; that after he pulled it down he put it under the hook where it is kept when it is down, and then stepped in the car and threw the switch on; that at the time he threw the switch there was no "arc in the cabinet" where the switches are; that there was no burning of any kind in the cabinet; that if you pull the switch with the trolley on you will get burned; that he did not get burned because he pulled the trolley down first; that when the trolley is down there is no power.

Patrick J. Ganley, a witness on behalf of the defendant, testified in substance that he was employed as a motorman for the defendant; that he was a guard on the train on which the plaintiff was a passenger; that he relieved a man at Wilson avenue; that as he, the witness, got on the train, the man said something to him but that he, the witness, did not understand what was said; that the plaintiff talked to him after the train left the Chicago avenue station; that he, the witness, went into the car at Chicago avenue for the first time after leaving Wilson avenue; that when he went in the car the plaintiff told him she had received an electric shock; that he "did not notice her crying;" that he said, "If you feel bad I shall have you taken off at the next station at Kinzie street; there is a train clerk there and he can have you taken care of;" that she said she was in a hurry and could not get

off there; that he asked her where she received the electric shock and she said that she was sitting on the east side of the car at the time and that it happened when the other guard threw the switches at Wilson avenue or Lawrence avenue; that he took hold of the handle from which she said that she had received the electric shock and that he did not feel any electric shock; that he looked into the switch cabinet and there were no burnings or evidence of any fire in there; that he saw no signs of smoke marks in the box; that after leaving the loop he sat down in the seat, put his feet against the tank underneath, then took hold of the grab handle to test it, and did not feel any electric shock.

Herman Young, a witness on behalf of the defendant, testified in substance that he was employed as inspection foreman by the defendant; that on October 23, 1920, about three o'clock in the afternoon, the car on which the plaintiff had been a passenger was inspected by electricians; that he supervised the inspection; that they used a bank of lights connected with the trolley (one end of the bank) using the other end of the bank in "testing for a ground;" that then they reversed, put the bank on the ground and tested all around for a leak of current and found nothing; that he looked in the cabinet and examined all the cables, wiring, switches and fuses; that he examined the whole contents of the cabinet, and the insulation was not cracked; that the fuses were good and there were no signs of a fuse having burned out or of there having been an arc in the cabinet; that the switches appeared to be in good condition and showed no burns, "arcing" or leakage of any kind; that besides using the bank of lights he used a voltmeter, a very sensitive instrument that will show the smallest fraction of a leakage of current; that he found no leaks with the voltmeter; that he examined the back of the cabinet, the seat adjacent to the cabinet, the floor, the tank underneath the

seat, the screws that hold the handle to the cabinet, and found no current; that the screws were too short to go through the wood; that he examined all of the cables in the switch box; that he made a test with the current coming in from the third rail.

George Brooks, a witness on behalf of the defendant, testified that he was an electrical engineer inspector for the defendant; that on October 28, 1920, about three o'clock in the afternoon, he examined the car on which the plaintiff was a passenger. The witness appears to have assisted Young in making the inspection. The witness' testimony is substantially the same as Young's.

Adolph Baus, a witness on behalf of the defendant, testified that he was superintendent of shops and equipment for the defendant; that he had been an electrician for thirty-two years and has had experience in construction work, power insulation, power house and car equipment; that there have been no physical changes in the construction of the car on which the plaintiff was a passenger since it was rebuilt in 1913 from a trolley to a motor car; that he examined the car on October 29, 1920. The witness described at length in minute detail the various appliances that were contained in the cabinet, the kind of insulation that was used in the cabinet, and the manner in which the electrical current was operated in connection with the switch in the cabinet. The substance of his testimony is that the insulated wire that was used was the kind in general use all over the country; that he knew of no other method in general use for insulating a switch than the one that was used in the cabinet; that the material used was what was generally used in the United States; that the cabinet contained a slate base approximately 1 1/8 of an inch thick; that slate is the best known insulating material that is used by electrical manufacturers; that slate

insulation is the best that is known to afford the greatest protection; that there were no breaks in the installation or the wiring; that there were no breaks in any part of the apparatus that he described; that the screws, and the installation in connection with the screws of the different apparatus, were not burned; that they were clean and bright; that they were not in any different condition from what they were when he put them in; that the "jumping distance of a spark of a voltage of 625 is in the open air less than one-hundredth part of an inch, and that any fingers that are held near that, if not in contact, will never feel the current at all."

Dr. John S. Sweeney, a witness on behalf of the defendant, testified in substance that he was a practicing physician and surgeon, and had been for the last twenty-five years; that he has known the plaintiff since about 1919; that at one time he lived in the same flat building that she did; that he examined the plaintiff at her husband's office on October 28, 1930, at about two o'clock in the afternoon; that he was sent there by the defendant; that his examination was confined to the parts complained of, the right arm and right leg; that he was there about 15 or 20 minutes; that he tested the elbow reflexes and the grip of the hand to see about the tone of the muscles, and to see if there was any paralysis or inability to use the muscles; that he found that the muscles were functioning properly and there was no paralysis; that in his opinion there was no damage done either to the muscles or the nerve of the arm; that he tapped the ligaments over the knee and found that the muscle and nerve supply of the leg was functioning normally; that he made another test by resisting the patient, that is pushing with the hand or foot; that he found the normal response; that he found no swelling and no marks or burns of any kind; that he found no objective signs of injury; that he has seen people who have received electric

shocks and that he is familiar with the symptoms of electrical shocks; that he never heard of a swelling following an electrical shock where there was no burning; that in his opinion there is no connection between the electric shock received by the plaintiff and the condition of her arm; that if there was a paralysis of the nerve supplying the arm and it is affecting the upper muscles, it would affect the lower muscles just the same as it does the upper.

Dr. James Whitney Hall, a witness on behalf of the defendant, testified in substance that he is a physician and has been practicing for twenty years in the city of Chicago; that he has seen a great many cases of injuries from electric shock, electric burns, and electric contacts; that in his opinion there is no causal relation between the shock and the condition of the plaintiff.

George R. True, a witness on behalf of the defendant, testified in substance that he is a claim adjuster for the defendant; that Dr. Strauch told him that the plaintiff "was very temperamental and she was suffering from traumatic neurosis;" that Dr. Strauch also said that he had advised the family to settle, for the longer the case is drawn out the worse it will be; that women are imaginative when accidents occur.

Elsie Anderson, a witness on behalf of the defendant, testified in substance that she worked for the plaintiff for a few months after New Year 1922; that the plaintiff helped her to do things like sweeping and beating the rugs, and used both hands; that sometimes when the washerwoman did not come plaintiff did her own washing and ironing with an electric washing machine; that she, the witness, saw the plaintiff hang up the clothes using both hands; that the plaintiff lifted her baby out of the buggy and used both arms; that she, the witness, did not "exactly have any trouble with the plaintiff, but that the plaintiff "got me disgusted once by

telling me to come to work and fooled me when I came there;" that she, the witness, has nothing against the plaintiff; that she likes the plaintiff.

The substance of the contentions of counsel for the defendant in regard to the evidence is that the "evidence undoubtedly shows" that the plaintiff did not receive an electric shock; and that even if it should be assumed that she did receive an electric shock, "evidence to support the finding that the defendant was guilty of any negligence is wholly lacking." Counsel for the defendant elaborately discuss the evidence to show that on the physical facts "it was impossible for the plaintiff to receive an electric shock."

As we view the evidence there are only four possible theories permissible in regard to the question whether the plaintiff received an electric shock and was injured by the shock. First, that the plaintiff was not shocked and was not injured, but that her idea that she was shocked and was injured was an hallucination due to a neurotic attack such as hysteria; and that the hallucination as to the shock and the injuries has continued to the present time. Second, that the plaintiff was not shocked and was not injured, but that her idea that she was shocked and was injured was an hallucination due to a neurotic attack such as hysteria; that she recovered from the hallucination as to the shock and the injuries, and is now malingering in order to obtain damages from the defendant. Third, that the plaintiff was not shocked and was not injured, but for the fraudulent purpose of bringing an action for damages against the defendant, she pretended that she was shocked and that she was injured; and that for the same fraudulent purpose of obtaining damages from the defendant, she still pretends that she was shocked and that she was injured. Fourth, that the plaintiff was shocked and was injured.

an hallucination

The first two theories are so highly improbable that they should not be seriously considered. There is no evidence whatever that the plaintiff suffered from hysteria or from any form of neurosis. On the contrary she testified that her "health was as fine as could be;" and that before the accident she had never been under a doctor's care except at the birth of her children. Dr. Strauch and Mrs. Cartwright, both of whom knew the plaintiff, testified that the plaintiff was a normal, healthy woman before the accident.

Dr. Adams testified expressly that the condition of the right arm of the plaintiff was not caused "simply by hysteria" or by the plaintiff "thinking that the arm was affected."

The only testimony that in any way bears on the question whether the plaintiff was neurotic is the testimony of George H. True, a claim adjuster for the defendant. True testified that Dr. Strauch told him that the plaintiff was temperamental and was suffering from traumatic neurosis. Dr. Strauch testified explicitly that the plaintiff was not a "temperamental woman," that she was a woman of "energy and vigor," and that in his opinion the condition of the plaintiff was caused by the electric shock the plaintiff alleged that she received. Even if Dr. Strauch had made the contradictory statements that True testified to, that fact would not be substantive proof that the plaintiff was temperamental and suffering from neurosis, but would only tend to discredit Dr. Strauch as a witness. I. C. R. R. Co. v. Eads, 206 Ill. 523, 529, 530; Chicago City Ry. Co. v. Matthiessen, 212 Ill. 292, 296, 297. The rule in regard to self-contradictions by a witness, as stated by Wigmore, is as follows:

> "We do not have to choose between the two (as we choose in the case of ordinary contradictions by other witnesses.) We simply set the two against each other, perceive that both can not be correct, and immediately conclude that he has erred in one or the other, - but without determining which one. It is the repugnancy and inconsistency that demonstrates his error,

and not the inferior credibility of the prior statement. Thus, we do not in any sense accept his former statement as replacing his present one; the one merely neutralizes the other as a trustworthy one." 2 Wigmore on Evidence, Section 1018, p. 1179 (1st ed.)

The third theory is untenable since there are no facts or circumstances in evidence from which fraud may be inferred; and the rule is a familiar one that fraud is never presumed but must be clearly and convincingly proved.

With the questions of fraud and neurosis, such as hysteria, eliminated, the evidence, in our opinion, compels assent to the remaining theory that the plaintiff did receive an electric shock and was injured. Her actions at the time of the accident, if not attributable to fraud or neurosis, such as hysteria, can be explained only on one reasonable hypothesis, and that is that she did receive an electric shock and that she was injured. We do not deem it necessary to discuss the evidence in detail relating to these questions, in view of the fact that we have previously set out at length all of the material evidence bearing on the questions. We shall merely direct attention to the testimony of the guards of the defendant, Ganley and Neeley, and the testimony of the witnesses Helm, Laverty and Gertrude Sheldon, which testimony is corroborative of the testimony of the plaintiff to the extent that the plaintiff appeared to have received injuries, and that the plaintiff said the injuries were caused by an electric shock. And we shall further direct attention to the testimony of Dr. Strauch and the testimony of Dr. Adams, which supplements the testimony of the witnesses just mentioned, and is to the effect that an electric shock could have caused the injuries which the plaintiff complains of.

It is true that Dr. Sweeney and Dr. Hall testified contrary to the testimony of Dr. Strauch and the testimony of Dr. Adams, but the question of the credibility of the witnesses was for the jury to determine.

In our opinion the evidence is amply sufficient to warrant a finding that the plaintiff received an electric shock and was injured.

Counsel for the defendant maintain that even if the plaintiff was shocked and was injured, there is no evidence that the shock and injuries were caused by the negligence of the defendant; that the "plaintiff did not attempt to prove any specific act of negligence on the part of the defendant, nor did she attempt to prove any defect of any kind in the car in question;" that negligence is never presumed from the mere happening of an accident, and that the maxim of res ipsa loquitur does not apply.

In our opinion the maxim res ipsa loquitur does apply. The doctrine of res ipsa loquitur is stated by the Supreme court of this State in the case of Chicago Union Traction Co. v. Wiese, 229 Ill., 260, as follows (p. 263):

> "When a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from the want of proper care. This rule of law results from the maxim res ipsa loquitur."

In stating the rule where the relation of carrier and passenger exists, the Supreme Court of this State, in the case of Barnes v. Danville Street Ry. Co., 235 Ill., 566, said (p. 573):

> "A carrier of passengers is not an insurer of their safety, and therefore liability does not arise from the mere happening of an accident; but the carrier is held to the exercise of the highest degree of care consistent with the mode of carriage and the practical operation of the business, and is liable for an injury resulting from such want of care. A declaration merely alleging the relation of carrier and passenger and an injury would not state a cause of action, but the plaintiff must allege and prove a breach of duty in the failure to exercise the care demanded by the law. If an injury to a passenger is caused by apparatus wholly under the control of the carrier and furnished and applied by it, or by some defect in machinery, cars or track, and the accident is of such a character as does not ordinarily occur if due care is used, the law comes to the aid of the plaintiff and raises a presumption of negligence. The presumption arises, however, from the nature of the accident and the circumstances and not from the mere fact of the accident itself."

In the case at bar there are facts and circumstances in evidence surrounding the accident from which negligence may be inferred. The evidence shows that the defendant was a common carrier; that the plaintiff was a passenger on the train of the defendant; that at the time she was a passenger she was in the exercise of ordinary care for her own safety; that when she was a passenger the train of the defendant was operated by electricity; that the electrical apparatus and the operation of the train were wholly under the control of the defendant. Considering these facts in connection with the rule that the defendant, as a common carrier, is held to the exercise of the highest degree of care consistent with the mode of carriage and the practical operation of the business, we are of the opinion that the facts make a prima facie case of negligence against the defendant and call for an explanation or a rebuttal. The case of Union Traction Company v. Hawmiller, 215 Ill. 383, may be cited as an apt illustration of the doctrine of res ipsa loquitur. In that case, while the plaintiff was a passenger on the car of the defendant an explosion occurred on the car by reason of which a panic was caused among the passengers, and the plaintiff, while in the exercise of ordinary care, was pushed from the car and was injured. The court said (pp. 388, 389): "... the explosion of a part of the machinery under the control of appellant, injuring appellee in the exercise of reasonable care for her own safety was prima facie evidence of negligence on the part of appellant."

In the case at bar, in addition to the facts which we have stated to be sufficient to make a prima facie case of negligence, the evidence shows that the plaintiff was seated at the rear of the car on one of the long side seats with her back partly against the cabinet which contained the switch and other electrical apparatus for the operation of the car; that she had her little finger hooked

around the brass handlebar attached to the cabinet; that she had her feet against the radiator under the seat and that her shoes were damp; that she received the electric shock at or near the place where the guard threw the switch in the cabinet to change the electric current from the trolley to the third rail. These additional facts strengthen the prima facie case made by the plaintiff.

The defense in substance is that the physical facts show that it was impossible for the accident to have happened; that the electric current was properly insulated; that the insulating was the material in common use; that there was no way in which the electric current could have escaped; that the car and the cabinet were inspected a few hours after the accident and were found to be in good condition; that nothing was found that would indicate that the current had escaped; that the guard properly threw the switch to change the current from the trolley to the third rail.

In this state of the record the question as to how the plaintiff could have received an electric shock is a perplexing one. The controlling fact, however, is that there is sufficient evidence to justify the jury in finding that the plaintiff did receive an electric shock. Counsel for the plaintiff has summarized sixteen facts from which he contends specific negligence may be inferred. As counsel for the plaintiff has not referred us to the abstract or record pages where these facts may be found, we are unable to consider them. But on the facts that we have stated, it is not necessary for the plaintiff to prove any specific act of negligence on the part of the defendant; As was said by the courtin the case of Alexander v. Nanticoke Light Co., 209 Pa. St. Rep. 571, where the plaintiff was shocked while handling an electric lamp which had

to be handled in order to light it (p. 575): "To say that one injured as the appellant was cannot recover unless he affirmatively proves in the first instance, the specific act of negligence of the company which caused the injury, would, in many cases, be a denial of a right to recover at all, no matter how negligent the company might be." In the case of McGonagh v. Boston Elevated Ry. 208 Mass. 436, which was an action for damages for injuries alleged to have been received by the plaintiff from an electric shock, the court held (pp. 439, 440) on the evidence in the case that it was not necessary that each step which led up to the plaintiff having received an electric shock should be fully proved.

In the case of Alton Ry. & Illuminating Co. v. Foulds. 81 Ill. App. 322, which was an action for damages by the plaintiff for injuries alleged to have been received from an electric shock, the defense, which was similar t o the one in the case at bar, was stated by the court as follows (p. 326):

> "The defendant then introduced evidence tending to prove that its plant and appurtenances were of the best in use; that they were kept in good condition, and that insulators had been put on some of the trees that the primary wires came in contact with, and that its wires were daily tested for grounds, with other evidence tending to show that it was not negligent in maintaining and operating its entire system, and it also introduced testimony of several witnesses who testified that at or about the time of the accident an electrical storm was passing not far distant. It then called a number of expert witnesses who testified that, in their opinion, the death of Mrs. Foulds was caused by a static discharge of electricity, in consequence of the electric storm, and that it could be accounted for in no other way."

The court said (p. 334): "The question whether deceased met her death by a stroke of lightning coming from any place other than appellant's plant, and the question whether her death was caused through the negligence of appellant, as well as the question whether she was exercising ordinary care at the time she was killed, were all questions of fact to be found by the jury from all the evidence before them, and it would have been error for the court to have instructed the jury at the close of the evidence to find for the defendant."

We are of the opinion that the verdict of the jury in the case at bar is not manifestly against the weight of the evi-

dence, and that it should not be set aside. Adopting the language used by the court in the case of The People v. Boucher, 303 Ill. 375, 380, we would say that "It is the most important function of the jury and their peculiar province to determine the truth of the case, and the opportunity which they have of seeing and hearing the witnesses during their examination and cross-examination is clearly superior to that of a court of review, which has before it only a record of the words used by the witnesses."

According to the well established rule "where there is a contrariety of evidence and the testimony by fair and reasonable intendment will authorize the verdict, even though it may be against the apparent weight of the evidence, a reviewing court will not set it aside." Carney v. Sheedy, 298 Ill. 78, 83. To the same effect are the following cases: Illinois Central R. R. Co. v. Gillis, 68 Ill. 317; Bradley v. Palmer, 193 Ill. 18, 29. It is also the rule that a verdict will not be disturbed merely because the evidence is doubtful. Illinois Central R. R. Co. v. Cowles, 32 Ill. 116, 121; DeForrest v. Odar, 42 Ill., 500, 501.

Counsel for the defendant further contend that the evidence is "wholly insufficient to warrant the jury in finding that plaintiff sustained any damages by reason of the alleged electric shock."

All of the material evidence in regard to the alleged injuries of the plaintiff has been stated by us at length. It is unnecessary, therefore, to repeat the evidence? or to discuss it. In our opinion the evidence of the injuries is sufficient to support the verdict of the jury. Counsel for the defendant assert that there is no evidence that the miscarriage resulted from the accident. Counsel for the defendant are in error.

The hypothetical questions put to Dr. Strauch and to Dr. Adams in stating the assumed xxxxx injuries to the plaintiff expressly assumed as one of the injuries that the plaintiff had

suffered a miscarriage. Both Dr. Strauch and Dr. Adams stated that in their opinion all of the injuries assumed to have been received by the plaintiff might or could have resulted from the electric shock. Furthermore, Dr. Strauch testified that his answer to the hypothetical question was based on what the plaintiff told him and on what he found. He testified that he saw the foetus. There is no evidence which is contradictory of the testimony of Dr. Strauch and Dr. Adams in regard to the miscarriage. In the hypothetical questions put to Dr. Sweaney and to Dr. Hall, witnesses on behalf of the defendant, there was no assumption that one of the injuries of the plaintiff was a miscarriage.

Counsel for the defendant further contend that the hypothetical questions which counsel for the plaintiff put to Dr. Strauch and Dr. Adams were not correctly framed. We do not think that there are any errors in connection with the hypothetical questions that are serious enough to require a reversal of the judgment.

Counsel for the defendant further contend that the court committed reversible error in giving the following instruction on behalf of the plaintiff:

> "The court instructs the jury that if they believe and find from the evidence that the plaintiff was a passenger on one of defendant's cars and while such passenger she was in the exercise of ordinary care for her own safety, and that she received an electric shock, then the plaintiff has made out a prima facie case of negligence against the defendant and this places upon the defendant the burden of rebutting the presumption by proving that the electric shock, if you believe the plaintiff did receive such, could not have been prevented by all that human care, vigilance and foresight could reasonably do consistent with the mode of conveyance and the practical operation of the road."

It follows from the views we have previously expressed in regard to the question of res ipsa loquitur that we must decide adversely to the contention of counsel for the defendant.

An instruction similar in principle was given in the case of Union Traction Co. v. Newmiller, supra, a case which the

court held (p. 336) came within the maxim of res ipsa loquitur. The instruction was as follows (p. 338): "The courtinstructs the jury that if you believe and find from the evidence that the plaintiff was a passenger on one of defendant's cars, and while such passenger she was in the exercise of ordinary care for her own safety, an explosion occurred on said car, by reason of which a panic was caused among the passengers in said car, in consequence of which the plaintiff, without fault on her part, was pushed from said car and thereby injured, then the plaintiff has made out a prima facie case of negligence against the defendant, and this places upon the defendant the burden of rebutting that presumption by proving that the explosion could not have been prevented by all that human care, vigilance and foresight could reasonably do, consistent with the mode of conveyance and the practical operation of the road." In passing on the instruction the court said (p. 338, 339): "It is insisted that this instruction is fatally defective in that it fails to inform the jury that in order to entitle plaintiff to recover she must have shown not only that an explosion occurred, but that such explosion was caused by some negligence on the part of the defendant. In accordance with the authorities already cited, the explosion of a part of the machinery under the control of appellant, injuring appellee in the exercise of reasonable care for her own safety, was prima facie evidence of negligence on the part of the appellant."

In our opinion the instruction in the case at bar did not take from the jury their right to decide the question of negligence, as is contended by counsel for the defendant. The instruction is not a peremptory one. It only relates to the prima facie case. It left to the jury the question whether, on all of the evidence, the defendant was guilty of negligence. In other instructions the jury were instructed on the question of negligence and they could

not reasonably have supposed that the instruction objected to by counsel for the defendant was intended to exclude any of the evidence in the case from their consideration. Furthermore, we do not think that the instruction is erroneous, as counsel for the defendant contend, in telling the jury what constituted a prima facie case. The case of Johnson v. Pendergast, 308 Ill. 255, is cited by counsel for the defendant as authority for the contention of counsel that an instruction "in all essential respects the same as the one complained of" in the case at bar was erroneous, and as criticising the practice of telling the jury what constitutes a prima facie case. The instruction in the case of Johnson v. Pendergast, supra, was materially different from the instruction in the case at bar. One material difference is that it was a peremptory instruction. It is true that in the case of Johnson v. Pendergast, supra, the court did say incidentally that "it is doubtful whether the ordinary jurors would understand the meaning of the term prima facie," but nevertheless the court held as follows (pp. 262, 263):

> "Under the authority to declare what should constitute a prima facie case of negligence, the city of Rockford, in the exercise of its police power, provided that drivers in starting to turn from a standstill should give a signal by indicating with the whip or hand the direction in which the turn was to be made, and the failure to comply with that requirement would in law be prima facie evidence of negligence, and the instruction was right in saying so. But that was not the only law to be considered."

The instruction in the case of Johnson v. Pendergast, which, as we have stated, was a peremptory instruction, was held to be erroneous, not because "of attempting to tell the ordinary juror what constitutes a prima facie case," as counsel for the defendant assert, but because the instruction told the jury that certain proof, if established, would make a prima facie case for the plaintiff and entitle the plaintiff to recover, and ignored evidence for the defendant, particularly evidence as to the rate

authority for the contention of counsel

of speed at which the plaintiff was running, which, the court said (p. 264) by the statute was prima facie evidence of the plaintiff's negligence. Counsel for the defendant have also cited other Illinois cases on which they rely to support their contention that the instruction in the case at bar is erroneous, namely, the cases of Barnes v. Danville St. Ry. Co., supra; Mueller Bros. Art & Mfg. Co. v. Fulton Street Wholesale Market Co., 151 Ill. App. 685; Field v. French, 80 Ill. App. 78; Union Traction Co. v. Leonard, 136 Ill. App. 180; Piper v. Green, 216 Ill. App. 590. All of these cases are materially different from the case at bar. In the cases of Barnes v. Danville Street Ry. Co., supra, and Piper v. Green, supra, the court held in substance that it was error to instruct the jury that proof that the mere happening of an accident to a passenger raised a presumption of negligence. In the cases of Mueller Bros. Art & Mfg. Co. v. Fulton Street Wholesale Market Co., supra; Field v. French, supra; Union Traction Co. v. Leonard, supra, instructions were held to be erroneous, which, in substance, told the jury that if the plaintiff made out a prima facie case, the burden was on the defendant to prove by a preponderance of the evidence that the defendant was not negligent.

Counsel for the defendant further contend that the following instruction given on behalf of the plaintiff is erroneous:

> "The court instructs the jury that if you find for the plaintiff you will be required to determine the amount of her damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances as proven by the evidence before them; the nature and extent of plaintiff's physical injuries resulting from the electric shock in question, if any, if you believe from the preponderance of the evidence there was an electric shock so far as the same are shown by the evidence; her suffering in body and mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, she has sustained or will sustain

by reason of such injuries; her loss of time and inability to work, if any, on account of such injuries; and may find for her such sum as in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair compensation for the injuries she has sustained or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration."

Counsel for the defendant urge four objections to the instruction. The first objection is that in telling the jury that they were "required to determine" the amount of the plaintiff's damages, the instruction "made it mandatory upon" the jury "that they do so, and was in effect to tell them that the plaintiff had suffered damages." We hardly think that counsel for the defendant are serious in their contention. The jury could not possibly have so construed the instruction when they read the entire instruction. Immediately following the clause referred to by counsel for the defendant is the following clause: "In determining the amount of damages the plaintiff is entitled to recover in the case, if any." And throughout the entire instruction the qualifying phrase "if any" is used in connection with damages.

The second objection to the instruction is that the jury were told that they "have a right to and they should take into consideration all of the facts and circumstances as proven by the evidence before them;" that this language is broad enough to permit the jury to consider facts and circumstances that "have no relevancy to the question of damages," and that the instruction is erroneous and prejudicial. We think that the objection is without merit. Counsel for the defendant inadvertently overlook the fact that the clause complained of is separated only by a semicolon from the clauses which enumerate specifically the items that the jury may consider in determining the damages; for this reason the instruction is not fairly susceptible of the interpretation given to it by counsel for the defendant. Counsel for the defendant cite the case of Carney v. Marquette Coal Mining Co., 260 Ill.

220, in support of their contention. The case of Carney v. Marquette Coal Mining Co. does not sustain the position of counsel for the defendant, but is contrary to their contention. In that case there were two instructions referred to by the court as numbers 6 and 8. The instructions were not set out by the court, but the court stated that both instructions related to damages. In passing on the instructions the court said (pp. 226, 227):

> "Strictly speaking, the instructions should have limited the jury to a consideration of the evidence as to the damages, and not have authorized them to consider all of the facts and circumstances of the case. Instructions of this character have been condemned by this court. *** But in the case at bar we do not see how the instructions complained of could have led the jury to consider any improper fact or circumstance in the record in connection with the amount of damages. In addition to the general language referred to, instruction No. 8 advised the jury what they might consider in determining the amount of damages. As intelligent men the jurors would understand the general language, 'all the facts and circumstances in evidence,' to refer to all the facts and circumstances in evidence in connection with the particular elements of damages enumerated in the instruction. It is also said that instruction No. 8 authorized the jury to assess the damages regardless of all consideration of the evidence. If this be true it is a serious objection. Of course, an instruction that would authorize the jury to found its verdict upon anything other than the evidence would be erroneous, but instruction No. 8 is not open to this objection. It expressly limits the jury to the facts and circumstances in evidence in assessing the damages. In our opinion the want of strict accuracy in the language of these instructions could not have misled the jury to the prejudice of plaintiff in error."

The third objection to the instruction is that it permitted the jury to consider the question whether the plaintiff would sustain "future suffering and loss of health;" and that there is no evidence on which the jury could base such a finding.

It will be observed that the clause in question is qualified by the words "if any."

Moreover, we think that there is evidence on which the jury might have based such a finding. The evidence shows that at the time of the trial the plaintiff had not recovered the normal use of her right arm. The plaintiff testified that when she raised her right arm from a quarter to a half an arc it pained her; that

she could not wash clothes; could not iron; that she used her left hand in doing whatever household work she was able to do.

Dr. Adams testified that at the time he examined the plaintiff, namely, about the time of the trial, the right arm showed one-quarter of an inch of atrophy; and that the nerves of the right arm did not function normally. In the case of Chicago & Milwaukee Electric Ry. Co. v. Ulrich, 213 Ill. 170, 173, it was held that where the evidence shows that at the time of the trial the plaintiff has not recovered from the injuries complained of, it necessarily follows that there would be future damages to some extent; that the question how long future suffering might continue is a question that must necessarily be left to the jury to determine from the evidence.

Counsel for the defendant further maintain that the jury could not consider the question of future suffering because "there is no allegation in the declaration that the plaintiff was permanently injured or that she would suffer from her injuries in the future." Such allegations are not necessary. The declaration alleged that the plaintiff was "shocked, bruised, lamed, maimed and injured internally and externally and her right arm and shoulder dislocated and by reason thereof she became and was rendered sick, sore, diseased, scarred and disordered in body and mind, and as a direct result thereof suffered a miscarriage and was unable to attend to her ordinary affairs as a housewife." These allegations are sufficient to authorize an allowance of damages by the jury for prospective suffering. Eagle Packet Co. v. Defriese, 94 Ill. 598, 603; West Chicago St. R. R. Co. v. McCallum, 169 Ill., 240, 243.

The fourth objection to the instruction is that it was erroneous and prejudicial because it permitted the jury to consider the question whether damages should be allowed for the plaintiff's

"loss of time and inability to work."

Counsel for the defendant argue that the instruction is erroneous in this respect on two independent grounds: First, that the plaintiff was a married woman living with her husband and that there is no evidence that she was engaged in any business or occupation for herself; that in such a case she cannot recover for the alleged value of time lost or inability to work. In support of this position counsel for the defendant cite 8 American and English Encyclopedia of Law, p. 661. Second, "that there is no evidence upon which to base the instruction as to the value of her loss of time and inability to work even if she were entitled to recover for same." In support of this contention counsel for the defendant cite 6 Am. & Eng. Ency. of Law, p. 661, to the effect that "the general rule seems to be that in order to warrant a recovery for time lost, there must be some evidence from which its value may, at least, be inferred."

It may be granted for the sake of argument that both contentions of counsel for the defendant are correct, and that the court erred in giving the part of the instruction objected to. The question then presented is whether the error is a reversible error. Unless we can say that the error is prejudicial to the defendant, the judgment should not be reversed and the cause remanded for a new trial, with the consequent delay and expense. In our opinion the error was not prejudicial to the defendant. The verdict is not excessive and it is highly improbable that the verdict includes an allowance for the plaintiff's loss of time and inability to work. There is no evidence whatever in regard to that element of damage; and it is fair to assume that the jury made no allowance for such an item in estimating the damages. If they did, then we must indulge the unreasonable presumption that the jury arbitrarily selected an amount without any evidence to guide them; furthermore, that they did that in disregard of the instruction, objected to,

when read as a whole, and also in disregard of an instruction relating to damages given on behalf of the defendant. The instruction objected to, in a clause preceding that part of the instruction which specifically enumerates the items of damages that the jury may consider, limited the jury in their consideration of the question of damages to the facts and circumstances proved by the evidence. Furthermore, the clause "loss of time and inability to work" is expressly qualified by the words "if any." Again, in an instruction on behalf of the defendant the jury were told that unless the plaintiff proved by a preponderance or greater weight of the evidence that each one of the "claimed injuries and disabilities really exists or has existed, and also resulted from the accident in question," then the plaintiff could not recover for such alleged injury or disability, and the jury would have no right to include any amount in their verdict for any such alleged injury or disability, even though they should find the defendant guilty. In view of all of these directions to the jury which we have pointed out, particularly the qualifying words "if any," to which we give decided emphasis, we feel confident that the jury did not include any allowance in their verdict to cover the item of damage for the plaintiff's loss of time and inability to work. This conclusion is reasonable and probable. The contrary conclusion is unreasonable and conjectural. Our decision should be based on probabilities, not on conjectures. There are authorities which tend to support our views. In the case of Illinois Central R. R. Co. v. Sutton, 53 Ill. 397, the court held that an instruction was erroneous which directed the jury, in estimating damages, to consider any mental suffering the plaintiff may have undergone, but that the error was not a reversible one. The court said (p. 400): "It appears there had been a previous trial of this cause, in which the

plaintiff recovered four hundred and fifty dollars damages. How much this instruction may have contributed to swell the verdict, under the same facts, to more than eleven hundred dollars, if it contributed in any degree to that result, can not be known, but in looking into the evidence, it is very apparent the plaintiff was a great sufferer by the act of appellants, in his body and business, and the amount found by the jury is no more than just compensation therefor, if they really reach the measure to which he was entitled."

In the case of C. & E. I. R. R. Co. v. Haines, 203 Ill. 417, an instruction on damages was objected to on the ground that it authorized the jury to consider not only the age of the deceased, and his earnings, but all the other evidence in the case, which might include other than pecuniary damages. In deciding adversely to the objection the court said (p. 422): "There was no evidence except such as was legitimate on the subject of pecuniary injury."

In the case of P. C. C. & St. L. Ry. Co. v. O'Donnell, 118 Ill. App. 335, in considering an instruction relating to damages, the court said (pp. 337, 338, 339): "It is urged that the court erred in giving an instruction that if the jury should find the issues for the plaintiff, damages should be assessed with reference to 'proper pecuniary compensation for damages to her surviving husband and next of kin.' The contention is that as the declaration does not aver, nor the evidence tend to prove, that there were 'next of kin,' the action having been brought for the benefit of the surviving husband and there being no children, it was material error to instruct that compensation could be awarded for damages to the 'surviving husband and next of kin.' * * * The alleged error did not in any way relate to the question of liability but only to the damages. As to this the jury were fully and clearly

instructed at the instance of appellant; and the instruction complained of limits the finding to what the jury 'believe from the evidence to be proper pecuniary compensation for damages to her surviving husband and next of kin occasioned by her death.' There being no evidence of any damage except to the husband, the jury could scarcely have been misled, especially in view of the explicit directions on that subject of the other instructions above referred to.

In the case of Chandler v. Illinois Central R. R. Co., 171 Ill. App. 240, an instruction relating to damages was alleged to be erroneous because it allowed the jury to consider mental suffering as an element of damage. Although the court held that there could be no recovery for mental suffering unaccompanied by physical injury, the court said (p. 250): "** this instruction guards that point by saying, his suffering in body or mind, if any, resulting from such physical injuries ** and such future suffering ** if any as the jury may believe from the evidence by reason of such injuries."

Counsel for the defendant assign five specific prejudicial errors on the rulings of the court on the question of evidence. Two of the alleged errors are based on the refusal of the court to allow the witness, Daus, (1) to state through what nonconductors of electricity the current would have to pass in order to get into the handlebar on the cabinet; and to allow him (2) to state whether there was any connection between the direct current and the tank underneath the seat. The two objections in question are obviated by the fact that the matters referred to were fully covered in other parts of the testimony of Daus. He testified that the nearest electrical apparatus carrying any current to the handlebar was 3/4 of an inch away, and that in the space of the 3/4 of an inch there was insulating material, such as asbestos, boards, dry

wood, rubber and braiding. He also testified that the tank was not connected with any electrical apparatus.

A further objection in regard to the rulings of the court on the evidence is that on cross-examination of the witness Daus the court permitted him to state that upon opening the hood of an automobile in the night, sparks might be seen leading from a wire to the point of contact of the automobile. We do not think this ruling of the court constitutes reversible error. Daus stated that the condition described was due to the fact that the wires on automobiles are insufficiently insulated for the voltage carried. Daus, however, stated repeatedly in his testimony that the insulation of the electric current of the defendant was thoroughly and properly done. Furthermore, all of the questions relating to the electric current, the insulation and the operation of the electric appliances of the defendant were minutely explained by the witnesses for the defendant.

Another objection to the ruling of the court on the evidence is that on cross-examination the witness Broska was permitted to state that if the handlebar of the cabinet came in contact directly with the bare cable in the cabinet, a person who took hold of the handlebar would get a shock. On re-direct examination Broska testified that he examined the cable and that there was no break of any kind in the insulator around the cable. Obviously there is no reversible error in the ruling objected to.

The two remaining objections in regard to the ruling of the court on the evidence relate to the hypothetical questions put to Dr. Strauch and Dr. Adams. We have previously expressed the opinion that no reversible error was committed by the court in this respect.

Counsel for the defendant further assign specifically five reversible errors on the alleged misconduct of counsel for the plaintiff during the trial. We have examined each of the objec-

tions and we are of the opinion that none of them constitutes reversible error.

The first objection is in regard to remarks made by counsel for the plaintiff in connection with the part of the testimony of the witness Laverty, relating to the manner in which the plaintiff opened her handbag to get out a card. Laverty said she "attempted to get the card out of the bag," and counsel for the complainant suggested that the witness be allowed to show how the plaintiff attempted to do it. To this suggestion the trial attorney for the defendant objected. Counsel for the plaintiff said, "Well, you don't want the facts then." The trial attorney for the defendant replied, "Now, I object to that. That is just exactly what I do want, the facts, but I don't want you to tell him what the facts are." We think that the above statement of facts which we have made in regard to the remarks of counsel for the plaintiff shows, without any discussion, that the objection of counsel for the defendant does not constitute reversible error.

The second objection in regard to the alleged misconduct of counsel for the plaintiff relates to questions which were put to Dr. Hall by counsel for the plaintiff on cross-examination. Dr. Hall was asked these questions: "How long since you ever went to the home on a visit, doctor?" The doctor answered, "About two hours." The doctor was then asked, "Was that in connection with one of the companies that you represent?" The doctor answered, "No, sir." The doctor was further asked, "How many companies are you the doctor for?" The trial attorney for the defendant then objected to the "conduct and attitude of the counsel for the plaintiff," and the court sustained the objection. We see nothing in the incident that would justify us in reversing the judgment.

The third objection in regard to the alleged misco of counsel for the plaintiff relates to questions put by couns

the plaintiff to the witness Daus on cross-examination, in respect to the inspection of the car, and also to remarks of counsel for the plaintiff in regard to the inspection of the car. On cross-examination of the witness Daus by counsel for the plaintiff, in answer to a question whether the City of Chicago prohibited the use of conduits inside of the cabinet, Daus volunteered the statement that "they have O. K.'d this installation." Counsel for the plaintiff asked Daus this question: "Isn't it a matter of fact that the elevated railroads of Chicago have always resisted the attempts of the Electrical Department to inspect the equipment?" No answer was made to the question. An objection of the trial attorney for the defendant to the question was sustained by the court. We do not think that prejudicial error can be predicated on the question.

Counsel for the plaintiff continuing the cross-examination of Daus, asked the following question: "Now, isn't it a fact that a case is pending in court at the present time in which one of the employes of the Elevated railways of Chicago refused to permit the inspection and he was arrested under the ordinance?" No answer was made to the question. An objection to the question was made by the trial attorney for the defendant. The court sustained the objection and directed the jury to disregard the question. In this state of the record, we do not think that the question asked by counsel for the plaintiff constitutes reversible error.

The fourth objection in regard to the alleged misconduct of counsel for the plaintiff is based on remarks made by counsel for the plaintiff to the effect that he had been refused permission by the defendant to inspect the car. The remarks were made during a somewhat lengthy altercation between the trial attorney for the defendant and counsel for the plaintiff, which grew out of a request

made to the court by the trial attorney for the defendant that the jury be permitted to see the car. We have read the interchange of remarks between counsel for the plaintiff and the trial attorney for the defendant, which are set out at length in the abstract, and we are of the opinion that in the circumstances the remarks of counsel for the plaintiff were not prejudicial to the defendant.

Counsel for the defendant further contend as a fifth objection to the alleged misconduct of counsel for the plaintiff that by reason of the remarks of counsel for the plaintiff in regard to his having been refused permission by the defendant to inspect the car, the trial attorney for the defendant "was forced" to call the witness True "to contradict the statements and insinuations" of counsel for the plaintiff; and that the court erred in not permitting True to testify in this respect. We think that the objection is without merit. Counsel for the plaintiff had previously been called as a witness on behalf of the defendant for the purpose, as stated by the trial attorney for the defendant, "of asking him who he had asked for an inspection" of the car; and counsel for the plaintiff had been questioned by the trial attorney for the defendant in regard to correspondence between counsel for the plaintiff and conversations between counsel for the plaintiff and True in connection with the plaintiff's statement that he had been refused permission by the defendant to inspect the car. The trial attorney for the defendant offered to prove by True that counsel for the plaintiff had never asked the defendant for permission to inspect the car. It is obvious that the trial attorney for the defendant could not impeach the testimony of counsel for the plaintiff, who was the defendant's own witness; and as any remarks or statements that counsel for the plaintiff may have made while not on the stand as a witness cannot be considered as evidence, it is equally obvious

that it was not proper to attempt to contradict them. The remedy of the trial attorney for the defendant in regard to any such remarks was to move the court to strike the remarks from the record and to instruct the jury to disregard them.

Counsel for the defendant further assign as grounds for reversal six specific errors relating to alleged improper remarks of counsel for the plaintiff in the course of his argument. The first remarks objected to relate to the statement of counsel for plaintiff that "there are cases of such a character" that the burden of proof will shift. The trial attorney for the defendant objected to this statement, and the court sustained the objection.

The second objection is that after an interruption of the argument of counsel for the plaintiff by a conference of the court and counsel in chambers, counsel for the plaintiff resumed his argument and stated as follows: "Now, gentlemen, after we have had a little argument and a school of instruction out of your presence - you are not interested in that at all, but I want to go on with my argument. Gentlemen, in my opinion the law is that when a person entrusts himself or herself to a common carrier such as our street cars or our elevated roads, or anything of that kind, and when during the course of that journey anything unusual happens, that in itself establishes a case of negligence and the defendant must rebut that presumption that arises, that it has been negligent, by showing that, by the exercise of the utmost degree of care and diligence, it could not have prevented the happening of that unusual occurrence."

The third objection to the argument of counsel for the plaintiff is that counsel for the plaintiff told the jury of an instance he read in a newspaper where a young man whose shoes were wet went down into the basement of a store, took hold of an electric light, the socket of which was defective, and received a shock.

The fourth objection to the argument of counsel for the plaintiff is that counsel for the plaintiff made the following statement: "Gentlemen, if it was not for the fact that her hand became released from that bar, I am absolutely of the opinion that Mrs. Naumanns would have been killed right then and there."

The fifth objection to the argument of counsel for the plaintiff is that counsel for the plaintiff stated as follows: "He put me on the stand, and when I stated that I asked for an examination of that car, that is an absolute admission on the part of this defendant that I did so, and that I did not get such examination. And when I stated, gentlemen of the jury, that I permitted him to interrogate Dr.Strauch and arranged for it, that is the absolute truth in this case. Now, who is there? The absolute truth is that they would not let me see that car; and I sent them up there to talk to Dr. Strauch, to our doctor; that is the absolute truth in this case."

The sixth objection to the argument of counsel for the plaintiff is that counsel for the plaintiff made the following statement: "Gentlemen, electricity is a mysterious thing. They talk of non-conductors, etc., but I don't think there is any such thing any more. Gentlemen, we sit down in our living rooms and either put something on our ears or listen in a horn to New York talking and the only connection between New York and our living room is the air."

We do not think that any of the above six objections to the argument of counsel for the plaintiff constitutes reversible error.

For the reasons stated the judgment of the Superior court is affirmed.

JUDGMENT AFFIRMED.

McGurely, P. J., concurs.
Hatchett, J., dissents.

The fourth objection to the judgment of nonsuit for defendant is that counsel for the plaintiff made the following statement: "Gentlemen, it is now not for the first time has been known rumored from that bar, I am absolutely of the opinion that the, Supreme Court does not follow precedent, but I digress."

The fifth objection to the judgment of nonsuit in the CLARITY is that counsel for the plaintiff stated to the jury as follows: "Do you so in the study, but when I state that I make no mention of that now, this is an obstacle (Objection on the part of the defendant that I did so, and that I did not get any exception). And when I state, gentlemen of the jury, that I qualified his to Dr.Strauss and arranged for it, that is the absolute truth in this case. Yet, the in court the statutes that is that you would not let me do that and I was time to jail to do, strange, is not clear; that is the absolute truth in this case."

The sixth objection to the judgment of nonsuit is the plaintiff is that counsel for the plaintiff made the following statement: "Gentlemen, electricity is a mysterious thing. Has lots of non-conductors, etc., but I don't think there is any such thing any more. Gentlemen, we sit down in our living room and listen and wondering on our ears or listed in a room or our that radio and the only receiving values [illegible] and our [illegible] in the city."

To do not think that any of the above six objections is the ground of reversal the CLARITY sustainable [illegible] the error.

For the reasons stated the judgment of the Superior Court is affirmed.

[illegible]

Concur: [illegible]
Dissent: [illegible]

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236 I.A. 638

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| RED SEAL OIL COMPANY, a corporation, Appellee, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation, Appellant. | APPEAL FROM SUPERIOR COURT, COOK COUNTY. |

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action in trover brought by the Real Seal Oil Company, the plaintiff, for the alleged wrongful conversion by the defendant, the Chicago, Milwaukee & St. Paul Railway Company, of certain goods and chattels on the land of the defendant, which goods and chattels under the laws of Minnesota were personal property. The case was tried before a jury and the jury returned a verdict of $2253.92 in favor of the ~~defendant~~ plaintiff. From the judgment on the verdict the defendant prayed this appeal.

The material facts are substantially as follows: The plaintiff entered into a contract on July 6, 1915, with Albert Bittner, for the purpose of selling its oil products at Winona, Minnesota. About the same time that the contract was entered into between the plaintiff and Bittner, the plaintiff leased from the defendant certain land of the defendant situated along the railroad tracks of the defendant, in order to erect an oil station on the land. After the completion of the station, Bittner took possession of the station as agent for the plaintiff; shipments of oil were made by the plaintiff and Bittner conducted the oil business of the plaintiff. About 1916 or 1917 the plaintiff ceased to make shipments of oil to Bittner, and Bittner began to conduct the business in his own name. In 1918 the plaintiff began a suit for an accounting against Bittner. The com-

tract, however, between the plaintiff and Bittner was not terminated. On the contrary W. R. Jones, the president of the plaintiff, testified that Bittner was still the agent of the plaintiff and that the personal property at the oil station was the property of the plaintiff. On March 1, 1920, the defendant made a new lease to the plaintiff similar to the first lease, except that less land was included in the second lease. The plaintiff paid the rent for a year in advance. The lease provided that the plaintiff should continuously operate and keep open the oil station; and further provided that any violation of or failure to comply with any of the conditions of the lease should terminate the lease without any notice or act on the part of the defendant. After the execution of the second lease the relation between Bittner and the plaintiff continued as before. On January 1, 1921, before the second lease had expired, and without notice to the plaintiff, the defendant made a lease of the same land to Bittner. This lease, and also the leases to the plaintiff, included the land only. It did not include any of the personal property on the land and did not mention or refer to the personal property. The conversion which the plaintiff complains of is alleged to have been made by the defendant by reason of the lease of the land by the defendant to Bittner.

The contention of the plaintiff, as stated by counsel for the plaintiff, is as follows: "There having been no ground for cancellation of plaintiff's lease and no actual termination thereof, whether justifiable or not, and plaintiff never having sold the property, the execution of the lease from defendant to Bittner containing no reservation of plaintiff's property and the provision therein requiring and permitting Bittner to exercise dominion over plaintiff's property, amounted to a conversion of plaintiff's property by defendant, as well as by Bittner, which

gave plaintiff the right to maintain trover without any previous demand."

The answer of the defendant to the contention of the plaintiff, as stated by counsel for the defendant, is as follows: "Defendant contends that if it did in any manner violate plaintiff's rights, such violation did not constitute a conversion, but was at most a breach of contract for which an entirely different right of action lies, and where the measure of damages is radically different than in case of a conversion."

We agree with the contention of counsel for the defendant. Other independent grounds for reversal are urged by counsel for the defendant, but since we are of the opinion that on the facts there can be no recovery by the plaintiff in an action for conversion, it will be unnecessary for us to consider the other contentions of counsel for the defendant.

A conversion at law is generally defined as follows: "An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition, or the exclusion of the owner's rights." Bouvier's Law Dictionary.

In the case of Stock Yard Co. v. Mallory, Hon & Zimmerman Co., 157 Ill., 544, a conversion for which an action of trover will lie is thus described (p. 563): "A conversion is any unauthorized act, which deprives a man of his property permanently or for an indefinite time, and, when such a conversion has taken place, a demand is not necessary. A wrongful assumption of the ownership of property may be a conversion in itself and render a demand and refusal unnecessary."

Counsel for the plaintiff contend that the lease did not "merely grant the land without any interference with plaintiff's buildings and property thereon, but contained provisions

ners violate(d) the right to publicly express criticism and any grievance thereof."

The answer of the defendant to the questions of the plaintiff, as stated by counsel for the defendant, is as follows: "Government employees that if it did be any manner violate plaintiff's rights, such violations did not constitute a conversion, but was as much a breach of contract the right as certain different right of action lies, and thus the measure of damages is controlling circumstances that is case of a conversion."

To agree with the assertion of counsel for the defendant. Other jurisdictions generally hold are right to assert in the contract, but lines by act if the violation that as the facts have not to be in relation to the violation is a wrong for conversion, it will be unnecessary for us to consider the other questions of counsel for the defendant.

A conversion is the intentional taking of property the unauthorized exercise and exercise of the right of property-ship and such of property outside relations to another, to the alienation of their possession, or the deprivation of the owner's rights." Barker's law dictionary.

In the case of Jones v. Ft Bailey, 17 Bailey, 544, Bamberger v. AGT Co., 849, a conversion for which an action of trover will lie is thus described (p. 888): "A conversion is any unauthorized act, which deprives a man of his property permanently or for an indefinite time, and, when such a deprivation has taken place, a tender is not sufficient. A wrongful assumption of the ownership of property may be a conversion in itself and proof of demand and refusal unnecessary."

Thereof the the plaintiff should have the lower Ct. set further grant the land without any alienation with claims it's rights and property rights, the material property

requiring and purporting to authorize Bittner to interfere with, disturb and take possession as lessee of such buildings and other property." Counsel for the plaintiff state that the terms of the lease which so provide "are found in clause 2 requiring Bittner to use the premises as a site for a warehouse, shed, oil tanks, pipe line, and unloading apparatus, which of course would necessitate the use by Bittner of plaintiff's property or the tearing down of the same."

We think that the conclusion of counsel for the plaintiff is obviously erroneous. The provision referred to does not authorize the use by Bittner of the plaintiff's property that was on the land when the defendant made the lease to Bittner. The fact that it may have been necessary for Bittner to use the plaintiff's property or similar property in order to comply with the terms of the lease, did not require Bittner to make use of the plaintiff's property without the consent of the plaintiff. So far as the terms of the lease are concerned it was immaterial to the defendant what property Bittner might use. All that the lease required was that the land should be used by Bittner as an oil station in the manner provided by the lease; and the provisions of the lease did not authorize Bittner to violate the rights of the plaintiff or the rights of any one else in complying with the provisions.

Counsel for the plaintiff contend that "clause 3 of the lease also required Bittner to continuously operate and keep open for business said oil station, which of course would prevent plaintiff from exercising its right to change the management of its property; and that clause 9 forbids the maintaining of any signs on the property except those of Bittner."

We think that it is evident that neither of these provisions can be reasonably construed as authorizing the plaintiff to

assume any unlawful ownership or possession of the plaintiff's property.

In support of their position that the defendant was guilty of a conversion of the property of the plaintiff in making the lease to Bittner, counsel for the plaintiff rely on the case of Smyth et al. v. Stoddard, 203 Ill. 424. We are of the opinion that that case is not in point. There is a material difference between the facts in that case and the case at bar. In the case of Smyth et al. v. Stoddard, Smyth and Chew were owners of a farm which was occupied by a tenant, Stoddard, under a written lease. On the farm there was a stone foundation for a barn. Smyth and Chew in a written agreement authorized Stoddard to put a covering and stalling on the stone foundation of the barn at Stoddard's expense, and further agreed that at the termination of the lease they would either pay for the covering and stalling or would allow Stoddard to remove the covering and stalling. Smyth and Chew subsequently sold the farm to a man named Seyd, and assigned Stoddard's lease to Seyd. The assigned lease contained no reference to Stoddard's right either to remove the covering and stalling from the barn or to be paid for the covering and stalling; and Seyd did not know of the agreement. Seyd filed a bill in equity to restrain Stoddard from removing the covering and stalling; and Stoddard filed a cross-bill against Smyth and Chew. The court held (p. 430) that Smyth and Chew "having sold the barn with the farm, and thus put it out of their power to permit the appellee to remove the structure, were properly regarded as having received the value of the barn from the purchaser of the farm and converted the same to their own use, and hence liable to pay for the value of the farm as it stood, - not its value as torn down for removal."

It will be observed that one fact, which clearly distinguishes the case of Smyth et al. v. Stoddard from the case at

bar, is that in the former case there was a sale not a lease, as in the case at bar. The sale in the case of Smyth et al v. Stoddard included the barn and consequently Smyth and Chew were regarded as having converted the value of the barn to their own use. Another fact which distinguishes the case of Smyth et al. v. Stoddard from the case at bar is that Boyd, the purchaser of the farm, did not have knowledge of the agreement between Stoddard and Smyth and Chew, in which Stoddard was either to be permitted to remove the covering and stalling on the barn, or to be paid for the value of the covering and stalling. In the case at bar when the land was leased to Bittner by the defendant, Bittner knew that the personal property on the land was owned by the plaintiff.

From a consideration of the evidence we are of the opinion that the plaintiff has not established a cause of action.

At the close of all the evidence counsel for the defendant requested the court to instruct the jury to find the defendant not guilty. The court refused to give the instruction. Since we are of the opinion that the evidence does not establish a cause of action it follows that the court erred in refusing to give the instruction. We think, therefore, that the case should be reversed with a finding of facts. Mirich v. Forschner Contracting Co., 312 Ill. 343. In that case the court said (p. 357): "In our opinion section 120 of the Practice act was intended only to apply to cases where a jury was waived in the trial court by agreement of the parties, or where tried by jury the trial court would have been justified in directing a verdict because the evidence did not tend to establish a cause of action but refused to do so. In such a case the Appellate court may reverse the judgment with a finding of facts and not remand the case, for it has been held many times that for a trial court to direct a verdict where the evidence does not tend to prove the cause of action alleged is not a denial of the right of

trial by jury. If the trial court failed to do its duty, it would seem there could be no legal objection to giving the Appellate court the same power possessed by the trial court."

REVERSED WITH FINDING OF FACTS.

McSurely, P. J., and Hatchett, J., concur.

(Over.)

265 - 28923 FINDING OF FACTS.

We find that the defendant never at any time was in possession of the property in controversy, and never at any time exercised any right of possession over the property; that the defendant leased only the land to Bittner, and the property in controversy was not mentioned or referred to in the lease; and that the lease did not in any way authorize Bittner to exercise any right of possession over the property; that the lease to Bittner did not change the character of the possession of the property at all; that the property was in the possession of Bittner before the lease to Bittner, and that the property still remained in his possession after the lease to him.

330 - 28980

236 I.A. 638

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| MILDRED UNBEHAHN, by her next friend ETTA UNBEHAHN, Appellee, | APPEAL FROM |
| vs. | SUPERIOR COURT, |
| ALEXANDER FADER, SUSIE FADER, FRANK CONRY, Sr., FRANK CONRY, Jr., and NEWTON B. LAUREN, | COOK COUNTY. |
| NEWTON B. LAUREN, Appellant. | |

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the plaintiff, Mildred Unbehahn, 6-1/2 years of age, by her next friend, Etta Unbehahn, her mother, to recover damages for injuries alleged to have been received by Mildred Unbehahn, by reason of the negligence of Alexander Fader, Susie Fader, Frank Conry, Sr., Frank Conry, Jr., and Newton B. Lauren. The case was tried before a jury. All of the defendants were found not guilty except the defendant Newton B. Lauren, against whom the jury returned a verdict in the sum of $5,000. From the judgment on this verdict Lauren has prosecuted the present appeal.

The defendant Lauren asks for a reversal of the judgment on four independent grounds. First, that Mildred Unbehahn was a mere licensee, and that the defendant was under no legal obligation to protect her from any injury except wilful injury. Second, that the Conrys, as independent contractors employed by the defendant Lauren, are liable if any liability exists. Third, that the injuries did not result from the negligence of any of the agents or servants of the defendant, Lauren. Fourth, that the award of damages is excessive.

The facts are substantially as follows:

The defendant, Lauren, was the owner of an apartment building in the City of Chicago. At the time of the accident the building was managed by Albert F. Marthe as agent for the defendant Lauren. The building was purchased by the defendant, Lauren, from E. Alice Miller. Marthe and Alexander Fader held the title for the defendant, Lauren. During all of the time that the defendant, Lauren, owned the building, Marthe and Fader were his agents. E. Alice Miller, the former owner of the building, leased an apartment to Michael C. Hastings. The apartment was on the third floor of the building. The lease expressly provided that the apartment should not be occupied in whole or in part by any other person and should not be sublet to any person without the written consent of the lessor. The lease from E. Alice Miller to Hastings was assigned to Marthe, who was holding the title to the premises for the defendant Lauren. At the time that Hastings leased the apartment from E. Alice Miller, the apartment was not only occupied by Hastings himself, but also by his sister, Etta Unbehahn, and her husband, Elmer Unbehahn, their two children, Mildred and Lorraine, another sister, Agnes Hastings, and two boarders, Genover and Beska. The occupancy of the apartment continued the same after the lease was assigned to the defendant Lauren. Catherine Klaus, the janitress for the defendant Lauren, testified that she knew that Etta Unbehahn and her daughter Mildred were occupants of the apartment, and Marthe, the agent for the defendant Lauren, testified that he knew that Etta Unbehahn was an occupant of the apartment. Furthermore, Etta Unbehahn had paid rent to Fader, and also to Newton B. Lauren & Company. Marthe, Fader and Lauren were all in the real estate business, and occupied offices in the same suite. Prior to and on the day of the accident the Conrys were repairing the rear porches of the apartments in the building. Before beginning the work the Conrys nailed boards across the screen doors which led from the apartments to the rear porches.

On the afternoon of the day of the accident Charles Klaus, the husband of the janitress, went up to the rear porch of the apartment in question in order to remove "papers". He pulled off the boards that the Conrys had nailed on the screen door, and did not nail it back. Later in the afternoon Otta Umbehahn, the mother of the plaintiff, went to a grocery store with her sister Agnes Hastings, and left the plaintiff, her sister and another child in the apartment. The children went out on the porch. The plaintiff opened the screen door and it swung back. The plaintiff then reached for the screen door, lost her balance and fell to the ground, a distance of about 26 feet. She was rendered unconscious, and was removed to a hospital where she remained under the care of a physician for one month. She was unconscious about 2 days. She was taken home from the hospital and kept in bed for two weeks with ice packs on her head. She had a fracture of the skull near the right ear; there was bleeding from that ear which indicated that the fracture extended through the ear; there was a cerebro-spinal fluid discharge from that ear. That fluid comes from the covering of the brain and spinal cord. There was a great deal of blood and serum beneath the scalp. There was a fracture of both bones of her right arm. When she left the hospital the fracture of the skull was well healed, and the bones of the arm had established "a fair, good union." The bones of the ear, which had been fractured, had healed very well. The eardrum, which had been ruptured, was not completely normal. A year after the accident she was examined by the physician who had taken charge of her at the hospital. He made no examination of the ear. The arm was "pretty good." The result of the healing of the fracture of the skull was good; the bones were restored to their normal condition; there was a return to the normal condition of the arm. At the time of this examination the mother of the plaintiff complained to the physician that the child was stupid

and her hearing defective. About 9 months after the accident the plaintiff was examined by another physician, she found that the bones in her right arm had healed; that there was a slight deviation from a straight line, not much; that the drum membrane of the right ear did not vibrate as well as the left; that there was a scar on the drum membrane of the right ear; that this affects the hearing and is permanent. The mother of the plaintiff testified that for the first six months after the accident the plaintiff was extremely nervous; that she had practically no use of her right arm for a year; that she wanted to lie down a great deal, refused to play with the children, held her hand to her head, and complained of pain in her head, and that she does yet; that her sleep is broken and that she jumps and starts. The plaintiff testified that her head has hurt ever since the accident; that she can hear better with one ear than she can with the other; that she has pain in the morning; that maybe it will let up for about an hour and then come back and continue for 3 or 4 hours; that she had practically no use of her right arm the first year after the accident; that she is quite weak now; that she sleeps brokenly; that she wakes up in the night and is scared and cries for her mother; that she is in the 6th grade at school; that she might be promoted to the 7th grade on conditions. At the time of the trial the plaintiff was 11 years of age.

Considering first the question whether the plaintiff was a mere licensee in the sense that the defendant was under no legal obligation to protect her against injury, unless wilful, we are of the opinion that the determination of that question depends upon the question whether the plaintiff's mother was a lawful occupant of the apartment or a licensee. If the mother of the plaintiff was a lawful occupant of the apartment, then the law imposed upon the defendant the same legal duty to protect the plaintiff, as was imposed on the defendant to protect the plain-

tiff's mother. Schwandt v. Metzger Linseed Oil Co., 93 Ill. App. 365, 370; Silcox v. Lane, 167 Mass. 502, 506; Ralfe v. Tufts, 216 Mass. 563, 565, 566; 24 Cyc. p. 1119; 36 Corpus Juris p. 229. The question whether the plaintiff's mother was a lawful occupant of the apartment depends upon the issue of fact whether the defendant waived the provisions in the lease to Hastings, the brother of the plaintiff's mother, prohibiting either a subletting of the apartment by Hastings, or an occupancy of the apartment by any other person than Hastings without the written consent of the defendant. If the provisions were waived by the defendant, then the mother was a lawful occupant of the apartment and not a licensee, and consequently the plaintiff was also a lawful occupant and not a licensee.

The rule is well established that provisions of this character may be waived. Webster v. Nichols, 104 Ill. 160, 171; McConnell v. General Roofing Mfg. Co., 187 Ill. App. 99, 107. The evidence in the case at bar clearly shows that the provisions in the lease were waived by the defendant.

We are of the opinion, therefore, that the plaintiff in the case at bar was not a licensee in the sense that the defendant owed her no legal duty, but that she was a lawful occupant of the apartment and was entitled to reasonable protection against injury from the defendant. This conclusion is sustained by adjudicated cases similar to the case at bar.

In the case of Fold v. Madison Building Co., 216 Ill. App. 29, the plaintiff sued to recover damages for injuries received in an accident in an elevator in the building of the defendant. The plaintiff occupied a room in a suite of rooms as sublessee of a tenant of the defendant. The lease to the tenant provided that the tenant should not sublet any part of the premises and should not permit the use of the premises by any other persons than himself, his agents and servants. Evidence was offered to show that the defendant had knowledge of the plaintiff's occupancy of the room. It was contended by counsel for the defendant that the plaintiff was not a tenant of the defendant and was therefore a licensee; that the defendant owed her no duty other than not to injure her

wantonly or wilfully. The court held (p. 47) that "it was for the jury to say, under all the circumstances in evidence, whether plaintiff was rightfully occupying her office and with the implied assent of the defendant;" and that as the evidence tended to show that the plaintiff was rightfully on the elevator as a passenger, the defendant was required to exercise at least a high degree of care and diligence not to injure her.

In the case of Gilding v. Penn Mutual Life Ins. Co., 95 Minn. 279, a child 6-1/2 years of age, the daughter of one of the tenants of an apartment in an apartment building, while on a visit to a child in another apartment was injured on the back porch of that apartment. The court said in reversing the judgment of the trial court (pp. 282, 283):

> "The theory of the learned trial court in dismissing the action was that plaintiff's child was trespassing upon the porch, or at best a mere licensee; and, in conceding that she might have a right to be on the porch where her mother had stored her own articles, she did not have that same privilege on one of the porches of another tenant, but was required to take such premises at her own risk, or as she found them. * * * These apartments were occupied by tenants for domestic purposes. The defendant landlord, who rented and received compensation for their use, was in duty bound to contemplate all ordinary and reasonable purposes for which they might be used; and if, within such limitation it was intended to restrict the occupancy of the porches by the tenants and their children, it was just and reasonable that such restrictions should be definitely made and brought home to such persons. * * * Under the evidence in this case, considering the use that was made of the building by the tenants, the natural relations that arise from such use, the habits of the children, their tendency, which cannot be excluded from our inquiry, it seems very clear that it would be a question of fact for the jury to determine whether the defendant exercised proper care in maintaining the railing in a reasonably safe condition."

The case of McCall v. Cameron, 126 Minn. 144, was an action for damages for the death of Jeannette Wilfond, who was burned to death in a fire in the building of the defendant. Jeannette Wilfond was a "roomer" who rented a room from a tenant, Mrs. Moore, who in turn rented a flat of 8 rooms from the defendant. The court said (p. 146):

"It is contended by the defendant that her written lease with Mrs. Moore prohibited subletting, except upon written consent of defendant, that no such consent had been obtained to the renting by Jeanette Wilfond and hence she was a trespasser to whom defendant owed no duty or care. The court instructed the jury that, unless the preponderance of evidence showed that defendant 'with full knowledge of the fact consented to and acquiesced in this custom and practice of Mrs. Moore to sublet her rooms in her flat to tenants,' plaintiff had no standing in the court to urge any claim whatever against defendant for the death of her intestate. The evidence abundantly sustains the verdict on the proposition that Miss Wilfond was rightfully in the building. We do not think defendant was entitled to the instruction that plaintiff was required to prove that Miss Wilfond had a room in the building with the knowledge and consent of defendant. If the practice and custom of her tenants generally to rent out rooms was known to and acquiesced in by defendant, it was a waiver of the clause against subletting to some particular person, especially in the absence of any claim that the particular person was for some reason objectionable."

The case of Wardwell v. Cameron, 126 Minn. 149, involved an action for damages for injuries caused by the same fire as in the case of McColl v. Cameron, supra. In the case of Wardwell v. Cameron, the plaintiff was a guest of her daughter who had rented two rooms from a tenant of the defendant. The question whether the plaintiff was rightfully in the building and was a person to whom the defendant owed a legal duty was also raised in that case. The court said (p. 151): "There can be no doubt, that, if the landlord owes a duty to a tenant in the matter of providing fire escapes, the same is also owing the members of the family, the servants and the guests of the tenant."

Counsel for the defendant contends that the injury to the plaintiff occurred while the Conrys were repairing the apartment; that the Conrys were independent contractors, and that, therefore, the defendant was not liable for the injury. Grant-

ing for the sake of argument that the Conrys were independent contractors, we are nevertheless of the opinion that the injury to the plaintiff was not caused by any negligence on their part. The proximate cause of the injury was the act of Klaus, the husband of the janitress, in removing the boards nailed across the screen door and not nailing the boards back. Klaus was not employed by the Conrys, and was not in any way acting for the Conrys when he removed the boards from the screen door. He was doing the work for his wife and it was work that came within the ordinary duties of a janitor of a building.

Counsel for the defendant contends that Klaus was not in the employ of the defendant; that whatever work he did was merely to assist his wife who was the janitress; that he was "legally a stranger" to the defendant; and that the defendant was not liable for his act in removing the boards from the screen door.

On the question as to what was the relation between Klaus and the defendant the evidence is conflicting. The material testimony on behalf of the plaintiff is that Klaus frequently did work that came within the duties of a janitor; that Martha the agent of the defendant, knew that Klaus did the work; that Martha on several occasions referred to Klaus as the janitor; that Martha told Etta Unbehahn, the plaintiff's mother, to see Klaus in regard to repairs on the radiators; that Martha also told Etta Unbehahn, the plaintiff's mother, to see Klaus about the heat; that Martha spoke to Klaus about the heat in the presence of Etta Unbehahn, the plaintiff's mother; that Klaus was the subject of conversations between Martha and Etta Unbehahn, the plaintiff's mother, during the winter months especially. The substance of the testimony on behalf of the defendant is that Klaus only assisted his wife, who was the janitress; that Martha never authorized Klaus to do any work as janitor, and never referred to Klaus as the janitor; that

Klaus' wife did not "have any authority about employing help;" that "there was nothing said about the janitor work" to Klaus' wife; that Martha never told Etta Umbehahn, the mother of the plaintiff, to see Klaus about repairs on the radiators, nor to see Klaus about the heat, nor spoke to Klaus about the heat in her presence, nor had any conversation with her in which Klaus was referred to as the janitor.

It is apparent that it is a question of veracity between the witnesses of the plaintiff and the witnesses of the defendant as to whether Klaus was the servant of the defendant. The jury believed the testimony of the witnesses for the plaintiff and it was the special province of the jury "to determine the truth of the case." The People v. Boughner, 303 Ill. 375, 380. The most important function which the jury is required to perform is to determine on which side of the controversy the real truth lies where the testimony as to the material facts is directly in conflict and irreconcilable. Gainey et al. v. The People, 97 Ill. 270, 275. The rule is a familiar one that where "there is a contrariety of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony" the verdict will not be set aside. Bradley v. Palmer, 193 Ill. 15, 89; Illinois Central R.R. Co. v. Gillis, 68 Ill. 317, 319. There is sufficient evidence to sustain a finding of the jury that Klaus was the servant of the defendant.

Counsel for the defendant further contends that the defendant was not liable because he did not "have actual or constructive notice" of the act of Klaus. In support of his contention counsel for the defendant cites the case of Burk v. Hulett, 216 Ill. 543, which was an action against a landlord to recover damages for an injury alleged to have been caused by a defective condition of the landlord's premises which the landlord neglected

to repair. In such case the court said (p. 550) that the landlord could only be liable for negligence if he failed to repair the defective condition after notice of the defect, or after a length of time sufficient to charge him with constructive notice of the defect. In the case at bar, however, the action does not proceed on the theory that the defendant neglected to repair a defect on his premises. The action is based on the doctrine of master and servant. The specific negligence attributed to the defendant is the alleged negligence of Klaus in removing the boards from the screen door while repairs were being made. If Klaus was the defendant's servant, then the act of Klaus was in legal effect the act of the defendant; and no notice of the act of Klaus was necessary to the defendant.

In the case of McColl v. Cameron, supra, in considering a question similar to the one in controversy, the court said (p. 147):

> "The defendant had assumed the charge of keeping the chute clean. She employed a janitor for that and other purposes about the building. His negligence in the matter she must shoulder. * * * The rule invoked that defendant would not be liable for negligence, until she had notice of the congested or dangerous condition of the chute, is not applicable here. * * * She personally did not attend to the chute, but left it with the janitor. If he was negligent in allowing the congestion with inflammable rubbish, she is responsible."

In considering the contention of counsel for the defendant that the damages allowed by the jury for the injuries to the plaintiff are excessive, we do not think that it is necessary to discuss the evidence, since we have fully stated the evidence bearing on the question of the plaintiff's injuries. In our opinion the damages are not excessive.

After a careful consideration of all of the evidence, we think that the verdict of the jury is not manifestly against the weight of the evidence.

For the reasons stated in the opinion, the judgment is affirmed.

AFFIRMED.

McCurely, P.J., concurs;
Matchett, J., dissents.

342 - 29080

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| HARRIS & WALKER, Inc., a corporation, Appellee, vs. WM. KIMMILLER, Appellant. | 236 I.A. 638 APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the plaintiff, Harris & Walker, a corporation, in the Municipal Court of the City of Chicago, to recover a balance of $570, alleged to be due it from the defendant, William Kimmiller, on a contract with the defendant relating to the manufacture of "ring binders." The case was tried before the court. The court found in favor of the plaintiff in the sum of $570. From the judgment on the finding the defendant has prosecuted this appeal.

The grounds on which counsel for the defendant principally rely for a reversal of the judgment are, first, that the defendant did not enter into a contract with the plaintiff in regard to the manufacture of the "ring binders," but that the defendant merely agreed to answer for the debt or default of Erik S. Erag, who had a contract with the defendant to manufacture the "ring binders;" that the agreement between the defendant and the plaintiff was not in writing and, therefore, come within the Statute of Frauds; second, that the "ring binders" were defective and were not made according to the sample.

The testimony on behalf of the plaintiff in regard to the contract differs from the testimony on behalf of the defendant.

On behalf of the plaintiff Erik L. Erag testified, in substance, that in July, 1920, he had a conversation with the defendant relative to the manufacture of the "ring binders;"

that the defendant wanted to know who was going to do the binding work; that he, Krag, told the defendant that Harris & Walker, the plaintiff, was; that the defendant said he would like to see the manager of Harris & Walker; that a few days after this conversation with the defendant, namely, the latter part of July or the first part of August, he, Krag, took the manager, John P. O'Brien, of Harris & Walker, to the office of the defendant to meet the defendant; that there was a conversation between O'Brien, the defendant and him, Krag; that O'Brien said that as he, Krag, had no credit, and as he, O'Brien, had no money, he, O'Brien, could not go ahead unless he was sure he was going to get paid for the job; that the defendant assured him that he, the defendant, would see that he, O'Brien, got paid; that the defendant said he would hold out enough money on his, Krag's, account to pay O'Brien; that the defendant asked him, Krag, if that was satisfactory, and that he, Krag, said that it was satisfactory to him; that O'Brien declined to enter into a contract with Krag until this arrangement with the defendant had been made; that he, O'Brien, wanted to be sure that he would be paid for his work; that the defendant wanted to see a sample of the cloth that "we" were "going to put in," and then there was the question whether "we" could get enough of the material for the whole order; that in order to buy enough O'Brien had to lay out about $800 and asked the defendant for payment on that; that the defendant said he would pay O'Brien $500, or else give him a letter guaranteeing his account; that the defendant did not give such a letter; that the defendant said that he would send the letter in a few days; that a few days later O'Brien got a check from the defendant made out to him, Krag, and that he, Krag, went over and endorsed the check; that O'Brien said that the defendant had not sent the letter; that he, Krag, said that he was going over to ask the defendant about it; that the defendant said that he would send the letter in a few days, that is, the letter to the

effect that the defendant would hold out enough of his, Krag's account to pay O'Brien; that he, Krag, received the following letter dated August 6, 1920, from the defendant:

> "In accordance with your proposal, I hereby give you an order for 3,000 seven ring binders, to be made according to sample to be submitted on August 18.
>
> "It is understood that you will deliver these binders at the rate of 125 binders per week, beginning the first of November, 1920, time being the essence in the order.
>
> "We will pay you $2.15 per binder on delivery.
>
> Yours very truly,
>
> Commerce Clearing House,
> (Signed) William Kixmiller."

John P. O'Brien testified on behalf of the plaintiff substantially that he was the president of the firm of Harris and Walker; that he had conversations with Krag in regard to the manufacture of "ring binders;" that he, O'Brien, made up some samples; that a few days later Krag came back and wanted "a price on it" and that he, O'Brien, gave him a price; that Krag was not sure at the time how many he wanted, and that he, O'Brien, gave him a price on three thousand and five thousand; that a few days after that Krag came back and said that the defendant was going to give him the order; that he, Krag, was going to write to the defendant a written proposal and wanted to know if that price was good; that he, O'Brien, did not know Krag at the time and asked him for references; that Krag asked him on what terms he, O'Brien, could take it, and that he, O'Brien, told him that he could make him, O'Brien, a deposit beginning with enough to cover the material which he, O'Brien, had to buy to get the books out and that "we" (Harris and Walker) could send it over C.O.D. later; that Krag came back the following day and told him that the defendant would like to see him, O'Brien, with him, Krag; that he, O'Brien, went with Krag to the office of the defendant between July 15 and July 20, 1920; that he, O'Brien, told the defendant "we" (Harris and Walker) were in the business and had the equipment ready to help

make the binders, but that "we" (Harris and Walker) did not see fit to extend credit to Krag; that the only basis "we" (Harris and Walker) could accept the order would be to have a deposit - enough to cover the material which "we" (Harris and Walker) would have to purchase; that the defendant said that he was willing to advance some money for the material, but was not willing to advance enough for the covers. The covers, according to O'Brien's testimony, had cost him about $800 as he had bought enough for 3,000 binders. O'Brien further testified that the defendant said that he would advance $500 on account; that he, O'Brien, said "all right if you want to do that I will go ahead with it and buy the material;" that he, O'Brien, thought that was fair enough and was willing to take some chance himself; that the defendant said "Well, why can't we fix it up with Krag and let me cover your account and keep it out of Krag's;" that he, O'Brien, said, "That is satisfactory to me;" that the defendant said he would hold out enough money from Krag to protect him, O'Brien, for the delivery of the books if that was satisfactory to Krag; that he, O'Brien, asked the defendant if he would put that in writing, and he said that he would; that after the defendant wrote the letter dated August 6, 1920, to Krag, he, O'Brien, went to the office of the defendant, and that the defendant gave him a check for $500 payable to Krag; that the defendant said "there is the check I promised you;" that he, O'Brien, said "what about the letter;" that the defendant said, "O'Brien, what do you want? My God, there is my check. Isn't that writing enough for any man?" O'Brien testified that the defendant had promised him twice personally and once in the presence of Krag, to write the letter and have Krag sign it. O'Brien testified further that the defendant did not ask him what he was charging Krag for the work and that if the defendant had asked him he would not have told the defendant. O'Brien testified further that after the binders were delivered to the defendant, he, O'Brien,

went to see the defendant to ask him for a check for the balance; that the defendant said he was not going to pay any more; that he, O'Brien, was present when Krag asked the defendant for the balance of $500; that the defendant said he had paid enough, he wasn't going to pay any more. O'Brien further testified that at the time of this conversation with the defendant, the price of the material had gone down a great deal. On cross-examination O'Brien was somewhat confused as to whether the date of the conversation with the defendant and Krag was before or after the letter of August 6, 1920, from the defendant to Krag. O'Brien's doubt about the date was due to the fact that he thought he had received the check for $500 "a few days" after the conversation with the defendant and Krag, and he was told by the trial attorney for the defendant that the check was paid on September 14. Later O'Brien was recalled as a witness and corrected the testimony that he had given on cross-examination in this respect. On direct examination he had testified expressly that the conversation was between July 15 and July 20, 1920, and this testimony was corroborated by Krag's testimony.

The above two witnesses, Krag and O'Brien, are the only witnesses that testified on behalf of the plaintiff in regard to the contract.

Only one witness testified in regard to the contract on behalf of the defendant, and that was the defendant himself. He testified, in substance, that he had one conversation that he recalled with O'Brien; that it was in the early part of September, 1920; that at that time O'Brien came into his, the defendant's office, and said that he had a contract to do the bindery work on the job which Krag had with him, the defendant; that he had investigated Krag and had found that he was wholly unreliable; that he, O'Brien, would not go ahead with the contract unless there was some sort of guarantee made to assure him that he would get his money; that he, the defendant, said "Under no circumstances will I

guarantee you your money. I am experimenting with Krag on this and I am afraid I won't receive delivery. I have made other dealings with him in prior years and he has fallen down in one way or other, but that I felt kindly towards Krag and wanted to see him get back in the bindery work, and therefore was trying to help him out, and gave him this job, but last year he fell down on the preparation of the binders in that the covers were not satisfactory;" that he, the defendant, said to O'Brien, "This year he may fall down in another respect. The rings in this binder are more difficult than the ones we made last year, and he made no delivery, consequently I am not going to guaranty your contract;" that he said to O'Brien "however, in order to help you out, if Krag delivers a satisfactory binder, and I owed Krag anything, I would hold the money and ask Krag to give me an order for you, so that you would get your money directly from me;" that O'Brien said that was satisfactory, but that he needed funds at once to buy the keratol and buy the paper board, and "I said I would help out by advancing him $500 on order from Krag which I did;" that he, the defendant, did not promise O'Brien that he would give him a letter to the effect that he, the defendant, would hold out enough of Krag's account to pay O'Brien; that he, the defendant, does not recall that O'Brien ever asked him for such a letter.

The question as to which was the correct version in regard to the contract was for the court to determine; and the court accepted the testimony on behalf of the plaintiff.

In our opinion the facts testified to by the witnesses for the plaintiff clearly show that the agreement between the defendant and the plaintiff was an original contract relating to the manufacture of the "ring binders," and was not a collateral agreement in which the defendant promised to answer for the debt or default of Krag.

Counsel for the defendant further contend that the original contract between the defendant and Krag, namely the contract of August 6, 1920, was terminated, and that a new contract was entered into between Krag and the defendant, after the agreement that was made between the defendant and the plaintiff.

Krag and the defendant testified as to the facts relating to this contention.

Krag's testimony is in effect that he was not able to deliver the number of binders according to the terms of the original contract; that after he had delivered about 700 or 800 binders, the defendant said "Cut the order to a thousand because they had to buy so many outside;" that the defendant said further that he was in no hurry about the delivery of the rest of the binders; that the plaintiff wanted to get them out of the way so that he, Krag, tried to finish them; that there were 1000 "ring binders" finally delivered.

The substance of the testimony of the defendant in regard to the alleged new contract is that Krag did not complete the contract of August 6, 1920; that a new contract was made with Krag; that he, the defendant, told Krag that he, the defendant, had purchased binders elsewhere and had given up hope of getting the binders from him, Krag; that however since he, the defendant, had furnished him, Krag, with the money on the original contract and since both were in the deal and could not get out without some loss they must co-operate to get out with the least possible loss, and for him, Krag, to go ahead and finish 1000 binders; that he, the defendant, would pay him what the binders were worth at the time he, Krag, delivered them; that Krag said that this new arrangement was satisfactory to him; that he, the defendant, asked Krag at that time if he owed the plaintiff anything, and that he, Krag, said no; that the plaintiff had done practically

Thereafter, for the defendant firmly maintained that the
original agreement to leave the defendant and Jenny, namely the
meeting of August 6, 1980, was terminated, and that a new con-
tract was entered into between Jenny and the defendant, after
the agreement that was made between the defendant and the
plaintiff.

Here and the defendant insisted as to the first con-
tract on this conclusion.

Jenny's testimony in the action; that he was also
to deliver the number of bedroom furniture to the house at the
indicated instrument that after he had delivered about 800 or 900
bedroom, the defendant said "Go the other to a thousand bed-
rooms they had to buy as many furniture" that the defendant said
further that he was in no hurry about the delivery of the most
of the bedroom; that he potentially wanted to get them as far as
may be they, Jenny, began to realize that there were some bad
"bad bedroom" circle activities.

The testimony of the testimony of the defendant is con-
cern to the alleged new agreement is that Jenny did not complete
the contract of August 6, 1980; that a new contract was made with
Jenny that he, the defendant, told Jenny that the defendant,
had terminated Atlanta furniture and also gave as one of reasons
the delivery from Jenny. That however there was, no evidence,
had furnished him. Jenny with the money as the original contract
and alone with were in the deal and really not put not returns
were but they were consumed to get out with the bedroom furniture
Atlanta, and for him, Jenny, to be about and finish Atlanta bedroom that
he, the defendant, would say the Atlanta the Atlanta city work is
the time the Jenny, indicated that that Jenny with the time the
arrangement was unfortunate to take that for, the defendant,
which Jenny is that time if he said the plaintiff was doing, and
that he, Jenny, made say that the plaintiff but does unfortunately

nothing up to that time and that the $500 which had been given to the plaintiff was ample; that after that Krag did not give him, the defendant, any further orders to pay the plaintiff any money.

We do not think that the testimony of Krag and the defendant shows that the original contract was terminated and a new contract entered into. The original contract was modified to the extent of the reduction of the number of the binders from 3,000 to 1,000, but the evidence does not show that the price was changed or that the status of the plaintiff was altered in any way. In this connection there is significant testimony of O'Brien to the effect that after all of the 1000 binders were delivered to the defendant, he, O'Brien, went to see the defendant and asked him to pay the balance that was due to the plaintiff; that the defendant said he was not going to pay any balance. From this testimony of O'Brien it is evident that the plaintiff did not consider that its relation to the defendant had changed since the original agreement and that the defendant did not consider that there had been a change in the status of the plaintiff since the original agreement. The defendant did not put his refusal to pay O'Brien on the ground that he did not owe the plaintiff anything because the contract with which the plaintiff was connected had been terminated; the defendant merely said that he was not going to pay the balance. When Krag asked the defendant for the balance of $500 the defendant stated that he had paid enough. The evidence shows that at this time the price of material for binders had gone down.

Counsel for the defendant further contend that the binders were defective and were not made in accordance with the sample. The evidence shows that the defendant sent a number of the binders to his customers. There is testimony, however, on behalf of the defendant that some of the binders were defective

and were returned to Krag and to the plaintiff to be repaired. Elmer F. Schreiber, one of the witnesses for the defendant, testified that 250 binders were sent back for repairs; that he is pretty sure that all of them went back to the plaintiff except one or two bundles. Schreiber also testified that "he should judge" that at least 250 binders were repaired and returned; that the binders that were returned were the binders that had been sent back by the defendant to be repaired. According to Schreiber's testimony the defective binders were accepted by the defendant after they had been repaired.

The testimony on behalf of the plaintiff as to whether the binders were defective was to the effect that the binders were made according to the sample; that about 12 were sent back to the plaintiff for repairs; that they were repaired and returned to the defendant; that Krag took 8 or 9 back and replaced them with others.

Counsel for the defendant assign error on the refusal of the court to admit in evidence one of the 1000 binders that were delivered by Krag and the plaintiff to the defendant. The court refused to admit the binder in evidence because the proper preliminary proof was not made by the trial attorney for the defendant. The binder was merely identified as one of the thousand binders, and then offered in evidence without any proof as to whether it was in the same condition as when it was delivered to the defendant. The trial attorney then offered to show by the defendant that the defendant had examined the binders when they were in his shipping room, "and knows that they are now in the condition that they were immediately after the attempt to use them, which attempt was made immediately after the receipt." The defendant had previously testified that he did not keep track of the specific deliveries. However, if the offered testimony of the defendant had been admitted, it would not cover all of the

binders. The testimony would have been only cumulative as to the condition of some of the binders, and there was testimony on behalf of the defendant that some of the binders were defective.

After a careful consideration of all the evidence, we are of the opinion that the finding of the trial court was correct, and that the judgment should be affirmed.

JUDGMENT AFFIRMED.

McCurely, P. J., and Ketchett, J., concur.

434 - 20065

ALBERT C. WHITMAN,
Appellee,

vs.

KIRK & COMPANY,
Appellant.

236 I.A. 638

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

The present appeal is the second appeal that has been prosecuted to this court in the case at bar. The action is one for damages for injuries received by the plaintiff by reason of the alleged negligence of the defendant. On the first trial the jury returned a verdict of $3500 in favor of the plaintiff. On appeal by the defendant from the judgment on the verdict this court reversed the judgment and remanded the cause for a new trial. The court did not hold that the evidence was insufficient to establish a cause of action, but after weighing the evidence the court held that "the evidence in the record does not sufficiently show that the defendant was guilty of the negligence charged against it." (Case No. 26608 published in abstract form in 224 Ill. 644). On the second trial of the case the jury returned a verdict in favor of the plaintiff in the sum of $15,000. From the judgment on the verdict the defendant has prosecuted this appeal.

We have compared the evidence as stated in the opinion of this court on the first appeal, with the evidence on the present appeal, and we are of the opinion that the evidence on the present appeal is substantially the same as the evidence on the first appeal; and that the opinion on the first appeal should be adhered to. In this view it follows that the judgment of the trial court on the present appeal should be reversed and the cause remanded.

Counsel for the defendant contend that the evidence on the second trial was substantially the same as the evidence on the first trial and that therefore the trial court should have directed a verdict in favor of the defendant. We do not agree with the contention of counsel for the defendant. Since the Appellate court did not hold on the first appeal that the evidence was insufficient to establish a cause of action, but only held that on the weight of the evidence the evidence was insufficient to show that the defendant was guilty of negligence, we are of the opinion that the trial court ruled correctly in overruling the motion of the defendant to direct a verdict in favor of the defendant. Mirich v. Forschner Contracting Co., 312 Ill., 343, 356, 357; Case No. 29245, not yet reported.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

33 - 29106

236 I.A. 638

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JOSEPH SCHRAEDER,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

The defendant, Joseph Schraeder, was convicted in the Municipal Court of the City of Chicago, of stealing a vacuum cleaner of the value of $14, and was sentenced to the House of Correction for a term of three months and fined $1.00 and costs. He has prosecuted this writ of error to review the judgment of the Municipal Court.

The only ground relied on for reversal by counsel for the defendant is that the information does not describe with sufficient particularity the property alleged to have been stolen. The description of the property in the information is as follows: "one vacuum cleaner of the value of fourteen dollars."

In support of his contention counsel for the defendant cites the case of People v. Hunt, 251 Ill. 446, 449, which held that a description in an indictment of the property stolen as "$55 of good and lawful money of the United States of the value of to-wit $55," was too indefinite and uncertain; that the money should have been described with enough particularity "to call to mind the particular coins or bills and thus identify the things stolen."

In our opinion there is no analogy between that case and the case at bar. The phrase "vacuum cleaner" has a well understood meaning and definitely describes the thing stolen.

We think the judgment should be affirmed.

AFFIRMED.

McNurely, P. J., and Matchett, J., concur.

29174

46 - 29128

CHICAGO TITLE & TRUST COMPANY,
a Corporation,
Defendant in Error,

vs.

PATENT VULCANITE ROOFING COMPANY,
a Corporation,
Plaintiff in Error.

236 I.A. 639

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the plaintiff, the Chicago Title and Trust Company, a corporation, in the Circuit Court of Cook County, to recover from the defendant, the Patent Vulcanite Roofing Company, a corporation, the sum of $15,000 and interest. The sum of $15,000 is alleged to be the par value of 150 shares of preferred stock of the defendant, which had been pledged to the plaintiff as collateral to secure the payment of a loan made by the plaintiff to The Moody Church, a religious corporation.

The trial was had before the court without a jury. The court found in favor of the plaintiff in the sum of $17,813.50 and entered judgment on the finding. To review the judgment the defendant has prosecuted this writ of error. The record does not contain a bill of exceptions.

Counsel for the defendant rely on two assignments of error for reversal, which are as follows: First, that the trial court erred in striking from the files the affidavit of merits of the defendant filed November 7, 1922; second, the trial court erred in rendering judgment for the plaintiff.

The defendant demurred to the plaintiff's declaration on the ground that the declaration was insufficient to maintain the action. The record does not show what, if any, disposition was

made of the demurrer. But the record shows that after the demurrer was filed the defendant filed the plea of the general issue and an affidavit of merits. The filing of the plea by the defendant without having the demurrer disposed of constituted an abandonment of the demurrer. Davis v. Ransom et al., 26 Ill. 100,106,107; Parker v. Palmer et al., 22 Ill. 429, 430; Williams et al. v. Barker, 67 Ill. 238, 240.

On motion of the plaintiff the plea of the defendant was stricken from the files for want of a sufficient affidavit of merits and leave was given to the defendant to file an amended affidavit of merits. The defendant filed another plea of the general issue and also filed an amended affidavit of merits. On motion of the plaintiff, the court struck the amended affidavit from the files and gave leave to the defendant to file a second amended affidavit of merits. There was no order as to the plea. The defendant again filed a plea of the general issue and also a second amended affidavit of merits. On motion of the plaintiff the second amended affidavit of merits was stricken from the files and leave was given to the defendant to file a third amended affidavit of merits. There was no order as to the plea. On November 7, 1923, the defendant again filed a plea of the general issue and also a third amended affidavit of merits. On motion of the plaintiff the third amended affidavit of merits was stricken from the files. There was no order as to the plea.

It is this third amended affidavit of merits which the defendant contends was erroneously stricken from the files by the court.

The defendant did not elect to stand by the third amended affidavit of merits, but made a motion for leave to file a fourth amended affidavit of merits. The court overruled the motion, ordered that the default of the defendant be taken, and entered judgment against the defendant in the sum of $17,812.50.

No exception was taken by the defendant to the ruling of the trial court in denying the motion of the defendant asking leave to file a fourth amended affidavit of merits; and the action of the trial court in this respect is not discussed in the brief of counsel for the defendant.

The only assignment of error which is argued by counsel for the defendant in respect of the striking of the affidavits of merits from the files relates to the third amended affidavit of merits.

Counsel for the defendant, however, are not in a position to assign error on the ruling of the court in striking the third amended affidavit of merits from the files, since by making a motion to file a fourth amended affidavit of merits the defendant abandoned the third amended affidavit of merits. Stuber v. Schack, 83 Ill. 191; McMicham v. Follett, 87 Ill., 103, 104; Cavany v. Weiller, 90 Ill., 158; Harris et al. v. Willis, 209 Ill. App. 401, 402.

Counsel for the defendant maintain that the motion for leave to file the fourth amended affidavit of merits was not sufficient to constitute an abandonment; that the rule is that there must be an actual pleading over before there can be an abandonment. In the case of Harris et al. v. Willis, supra, it was expressly held that "asking leave to file a further amended affidavit of merits" constituted an abandonment. On principle the question of abandonment depends on the question of intent; and intent may be manifested as well by a motion for leave to plead over as by an actual pleading over. The only reason the defendant did not file a fourth amended affidavit of merits is that the court denied the motion. In order to raise the question of the sufficiency of the third amended affidavit of merits on appeal, the defendant should have stood by the affidavit. In the case of McMicham v. Follett, supra, the court said (p. 104): "Had appellant desired to test the sufficiency of his affidavit of merits, he should, in the first instance, when the motion was made to strike from the files his plea, have abided by the affidavit and excepted to the ruling of the court. His failure to do this, and obtaining leave to amend upon terms, must be regarded as a waiver of the

right to insist upon the sufficiency of the affidavit, on appeal."

Counsel for the defendant further maintain that the declaration of the plaintiff is insufficient. They contend that the plaintiff's motion to strike the third affidavit of merits from the files was a demurrer and that "plaintiff's demurrer to defendant's affidavit of merits" should have been carried back to the declaration. Without deciding the question whether the plaintiff's motion to strike the third amended affidavit of merits from the files was a demurrer or in the nature of a demurrer, we are of the opinion that independently of that question, the contention of counsel for the defendant is unsound, for the reason that a demurrer does not have to be carried back to the declaration except on a motion to carry it back. Town of Scott v. Artman, 237 Ill., 394, 399. No such motion was made.

In connection with their argument that the declaration is insufficient, counsel for the defendant further contend that "if the motion to strike in the case at bar was not equivalent to a demurrer, then the plea was, and still is, undisposed of."

Under section 55 of the Practice act, when the plaintiff files with his declaration an affidavit of claim he is entitled to a judgment by default if the defendant does not file a sufficient affidavit of merits. The usual way of taking advantage of the want of a proper affidavit of merits is by motion for a judgment, as in the case of a default, or by motion to strike the plea from the files for want of such affidavit. Firestone Tire Co. v. Ginsburg, 285 Ill. 132, 134; Cramer v. Commercial Mem's Ass'n, 260 Ill. 516, 522; Braidwood v. Weiller, 89 Ill. 606, 608; Stauber v. Stauber, 217 Ill. App. 365, 374. It is not necessary, however, to strike the plea from the files, although such a practice is proper and not uncommon. Firestone Tire Co. v. Ginsburg, supra (p. 134);

Cramer v. Commercial Men's Ass'n, supra, (p. 521).

It is also the rule that where an affidavit of merits is insufficient it is proper practice to strike it from the files, and the plaintiff is then entitled to judgment as in case of a default. Firestone Tire Co. v. Ginsburg, supra, (p. 134). After an affidavit of merits has been stricken from the files, it is the rule that it is not necessary to strike the plea from the files, "although the practice is not improper and is common." Firestone Tire Co. v. Ginsburg, supra, (p. 134).

In the case at bar, when the affidavit of merits was stricken from the files the plea was then without an affidavit of merits to support it, and the plaintiff was entitled to a judgment as in case of a default, even though the plea was not stricken from the files. Firestone Tire Co. v. Ginsburg, supra (p. 134); Cramer v. Commercial Men's Ass'n, supra (p. 521). In the case of Steuber v. Steuber, supra, in which the situation was the converse of that complained of in the case at bar, a plea was stricken from the files, but the affidavit of merits was not, and the court said (p. 384) that "it is obvious that a default would follow" whether the affidavit of merits was stricken or not.

Continuing their argument that the declaration is insufficient, counsel for the defendant further contend that in Illinois the question of the sufficiency of the declaration may be raised for the first time on appeal. In this contention counsel for the defendant are correct, provided that the insufficiency of the declaration is such that the declaration will not sustain the judgment. Kelly v. Chicago City Ry. Co., 283 Ill., 640, 646; Gillman v. Chicago Rys. Co., 268 Ill., 305, 310; The Chicago & Eastern Illinois R. R. Co. v. Hines, 132 Ill., 161, 165.

It is the rule that a reviewing court does not look with favor upon an objection urged for the first time on appeal, and that the declaration will be construed liberally and supported

by every legal intendment. 3 Corpus Juris, pp. 786, 787. Where the objection is made for the first time on appeal, the rule that the pleadings are construed most strongly against the pleader is reversed, and every reasonable presumption will be indulged in favor of a cause of action. 3 Cyc 287; O'Rourke v. Norcul, 241 Ill. 576, 579, 580; Wagner v. C. B. I. & P. Ry. Co., 277 Ill. 114, 119.

The pertinent allegations of the declaration of the plaintiff are, in substance, that the plaintiff made a loan of $15,000 ostensibly to the Moody Church, a religious organization, in the city of Chicago; that the money was in fact given to R. Glendenning for his individual use and benefit; that the loan was evidenced by a promissory note for $15,000, executed by Paul Rader, pastor of the Moody Church; that to secure the loan certain stock certificates of the defendant were delivered to the plaintiff by the Moody Church; that one of the certificates was for 150 shares of the preferred stock of the defendant, and stood on the books of the defendant in the name of R. Glendenning; that before the Moody Church delivered this certificate to the plaintiff, Glendenning endorsed the certificate in blank and delivered it to the Moody Church; that after the note became due and was not paid, demand was made by the plaintiff on the defendant to pay $100 a share on each of the 150 shares of the preferred stock; that the defendant had never paid anything on these shares; that the defendant refused to pay and thereby became indebted to the plaintiff in the sum of $16,875, which sum is $100 a share upon each of the 150 shares of the preferred stock plus interest from February 10, 1930, to July 26, 1932, the latter date being the date on which the declaration was filed.

The specific objections to the declaration which counsel for the defendant urge are, as far as we are able to

gather them from the brief of counsel for the defendant, as follows: (1) "That the declaration merely expresses an attempt on the part of a stockholder (or rather a pledgee of stock) to force a distribution of assets in contradiction of the rights of creditors, and by means not recognized in law;" (2) that "even after a corporation has been dissolved and all debts paid, a stockholder has no standing, as such, to sue for his distributive share in its remaining assets;" (3) that "the declaration is also fatally defective in failing to allege that plaintiff was owner of the stock in question;" (4) that "it is impossible to determine whether plaintiff is attempting to sue as owner or merely as pledgee."

We are of the opinion that after all reasonable intendments and presumptions are indulged in favor of the declaration, the declaration states a cause of action. The action is not an attempt on the part of a stockholder or pledgee "to force a distribution of assets in contradiction of the rights of creditors." It is merely an action brought by the plaintiff, as the pledgee of the shares of stock in question, to recover the amount alleged to be due to the plaintiff on those shares of stock by reason of the default of the payment of the note by the Moody Church. The remedies of a creditor who holds collateral given him to secure the principal indebtedness are thus defined in the case of Peacock v. Phillips, 247 Ill., 467 (pp. 471, 472): "Where notes and a mortgage were pledged to the bank, it was said (in Jenkins v. International Bank, 111 Ill. 462) that a creditor holding such securities has three remedies, and may file his bill to have the collateral sold for the payment of the principal indebtedness, or may bring suit upon the collaterals themselves, or collect the same by a sale of property conveyed in trust to secure them. *** If the securities of a third person are deposited as collateral, the creditor may collect the whole amount due from the

maker and will hold any surplus above his own debt as trustee for his debtor, and in such a case the maker of the securities is not concerned how the pledgor and pledgee should settle between themselves, but is held for the full amount of his debt."

Although we are of the opinion, as previously stated, that the question of the sufficiency of the defendant's third amended affidavit of merits is not presented for consideration on the record in the case at bar, nevertheless we have examined the affidavit and do not think that it is sufficient.

The substance of the pertinent averments in the affidavit, as stated by counsel for the defendant, are as follows: "That the stock certificate was issued to Robert Glendenning; had always stood in his name; had never been presented for transfer on defendant company's books, and plaintiff never was a stockholder in defendant company; that plaintiff never acquired said stock certificate by foreclosure of the pledge; had taken no steps of any kind to acquire title thereto and is not the owner thereof; that defendant never promised in writing to pay plaintiff the face value of said 150 shares of preferred stock and never recognized it as a stockholder."

The above averments do not constitute a valid defense to the declaration of the plaintiff. Allmon v. Salem Building Ass'n. 278 Ill. 336. In that case the court said (pp. 340, 341): "It is well known that in commercial transactions with banks and business men certificates of stock are very often pledged as security for loans by merely assigning and delivering the certificates of stock and without any thought or intention of the assignees becoming owners of the stock other than such qualified ownership for security. It is not usual or customary in such cases for the stock to be transferred on the books of the company to a pledgee. Moreover, section 52 of chapter 77 of Hurd's Statutes,

entitled 'Judgments,' provides: 'The share or interest of a stockholder in any corporation may be taken on execution, and sold as hereinafter provided; but in all cases, where such share or interest has been sold or pledged in good faith for a valuable consideration, and the certificate thereof has been delivered upon such sale or pledge, such shares or interest shall not be liable to be taken on execution against the vendor, or pledgor, except for the excess of the value thereof over and above the sum for which the same may have been pledged and the certificate thereof delivered.' This court held in Rigg v. Gilbert, 173 Ill. 348, that the meaning and purpose of that section were to give more commercial freedom to transfers of the stock for purposes of collateral security than existed before and to make shares of stock as nearly negotiable as possible. It was further held that as between the parties to such a pledge, and as to all other parties as owners with actual or constructive notice thereof, such pledge was valid and binding, although the transfer of the title to the pledgee is not made on the books of the corporation. As between the corporation and the pledgee in such a transfer the full legal title does not pass to the pledgee, and is not intended to so pass, in the sense that the corporation must recognize the pledgee as the owner of the stock having legal rights as a member of the corporation."

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

70 - 29157

ARTHUR JOHNSON,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS CO. et al.,
Defendants in Error.

236 I.A. 639

ERROR TO CIRCUIT COURT OF

COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, Arthur Johnson, from a judgment in the Circuit court of Cook County in favor of the defendant, the Chicago Railways Company, in an action brought by the plaintiff to recover damages for injuries received in an accident alleged to have been caused by the negligence of the defendant.

The substance of the declaration is that the plaintiff was injured while boarding a street car of the defendant near the intersection of Lake street and Market street, thoroughfares in the city of Chicago; that Lake street is a street that runs in an easterly and westerly direction; that the car was going west on Lake street; that an elevated railway maintained a structure in Lake street, and that one of the upright pillars which supports the structure was near the place where the plaintiff boarded the car; that while the plaintiff was boarding the car and after he had become a passenger on the car, the defendant negligently started and operated the car with excessive speed before the plaintiff had a reasonable opportunity to board the car; that by reason of the negligence of the defendant the plaintiff was struck by the pillar and was brushed from the car. The specific injury the plaintiff is alleged to have received was "the dislocation of cartilages of the right leg and knee."

The grounds on which counsel for the plaintiff asks for a reversal of the judgment are stated by counsel for the plaintiff as follows: (1) "The verdict was manifestly against the weight of the evidence;" (2) "Improper remarks and tactics of counsel;" (3) "Irregularity in the proceedings of the trial court;" (4) "Proper evidence offered by plaintiff in error was excluded;" (5) "The court gave an erroneous instruction on behalf of the defendant."

Since there is no motion for a new trial in the bill of exceptions, counsel for the plaintiff is not in a position to assign as error that the verdict is manifestly against the weight of the evidence. The rule is well established that in order to present the question of the sufficiency of the evidence for review, a motion for a new trial must be made and must be preserved by a bill of exceptions. Firemen's Insurance Co. v. Peck, 136 Ill. 493, 494, 495; Illinois Central R. R. Co. v. O'Keefe, 154 Ill. 508, 511; Greenwell v. Ness, 296 Ill. 459, 462. The motion for a new trial is not properly preserved on appeal although it may be incorporated into the record by the clerk of the court; the authority to certify that a motion for a new trial was made is vested in the trial judge alone. Firemen's Ins. Co. v. Peck, supra, (p. 495); Chicago, Burlington & Quincy R.R.Co., v. Haselwood, 194 Ill. 69, 71, 72; Greenwell v. Ness, supra, (p.459).

We have, however, examined the evidence and we are of the opinion that the verdict is not manifestly against the weight of the evidence.

The principal issue of fact was whether the plaintiff boarded the car when it was standing still or when it was in motion. On this issue the testimony is conflicting. On the plaintiff's behalf the plaintiff and four witnesses testified as to the manner in which the accident happened. On behalf of the defendant three wit-

nesses testified as to how the accident happened.

The plaintiff testified that when he boarded the car his brother, John Oscar Johnson, and a man named Frank Keller were with him; that the car was standing still; that two women got on the car at the rear of the car; that then his brother got on; that Keller followed his brother; and that he, the plaintiff, followed Keller; that as soon as he, the plaintiff, stepped on the step and was just about to step on the platform "the car gave a jerk, an awful lurch;" that the car started immediately when he got on the lower step; that he fell backwards and was caught in between the pillar and the rear end of the platform; that the pillar held him there like a vise until the car passed the pillar; that he then dropped to the ground.

John Oscar Johnson testified on behalf of the plaintiff that he is crippled; that he was with his brother, the plaintiff; that the car stopped; that two women got on the car; that he, the witness, got on; that then Keller got on, and that the plaintiff followed Keller; that the car started with a jerk and the plaintiff was "brushed against" the pillar; that he struck the rear end of the car; that he was "standing there stationary," that is, "hanging onto the handle of the rear end," for probably a distance of eight or nine feet when he fell off into the street; that he, the witness, hollered to the conductor to stop the car, that a man had been brushed off; that the conductor said "To hell with him, we are twenty minutes late now;" that he, the witness, grabbed hold of the rope to pull the bell and that the conductor gave him a push in the chest.

Frank Keller testified on behalf of the plaintiff that he is acquainted with the plaintiff and his brother; that the car stopped; that two women got on the car; that the plaintiff's brother then got on; that he, the witness, followed the plaintiff's brother, and that the plaintiff followed him, the witness; that the

that he attack the rear end of the car;

plaintiff was on the lower step when the car started right away with a jerk; that the plaintiff fell and was crushed in between the post; that the plaintiff's brother told the conductor to stop and that the conductor said, "To hell with him, we are twenty minutes late now."

Clifford Gottschalk testified on behalf of the plaintiff that he did not know the plaintiff; that he, the witness, was on the rear platform of the street car; that the car was standing still; that the plaintiff's brother got on the car; and that some women and some men got on; that there was a man on the first step of the car with his foot on the platform; that the man was knocked off between the pillar and the car; that the plaintiff's brother stopped the car; that the conductor said, "We are twenty minutes late; what is the use of holding me up here?" that the conductor called the plaintiff's brother a son of a bitch.

On behalf of the defendant Thomas Walsh, the conductor of the car, testified that the car stopped; that three or four people got on the car; that two were women; that he did not know if there were two men or one man; that when these people got on he started the car; that up to that moment he had not seen the plaintiff or his brother; that when the people got on the car he looked to see whether there were any others; that there was nobody standing there except those who got on the car; that he "gave the bell" for the car to start and that then he saw "the man that went around the post and managed to get on;" that he was a lame man; that as this man got on the car it was standing still; that the man grabbed the bell; that he, the conductor, saw another man come right after the lame man; that the car was moving when the other man started to get on; that the man jumped on the step as the car was going; that his shoulder struck the pillar, and that he fell

back; that he, the conductor, "gave one bell" to the motorman; that the lame man jumped at the bell cord and said, "Stop the car, you son of a bitch;" that the lame man grabbed him and pushed him; that the lame man started to jerk the bell, and "gave him two bells;" that he told the lame man to let the bell alone; that he was making the motorman go ahead; that he, the conductor, got off the car and went back to the man that fell; that he, the conductor, had a talk with him; that he, the conductor, asked him if he was hurt; that he said he was; that he, the conductor, told him that he had no business trying to board a moving car; that the man did not dispute it; that when the lame man came from behind the pillar he, the conductor, did not see the plaintiff; that he, the conductor, did not see either the plaintiff, his brother or Keller; that Gottschalk was not standing on the platform at that time; that he, the conductor, did not call the lame man a son of a bitch and did not say, "To hell with him, we are twenty minutes late now."

John J. Waghe testified on behalf of the defendant that he was a switchman on the Belt Railways; that it was his custom to take that particular street car; that he knew the conductor by sight; that he was on the rear platform when the car reached Market street; that nobody was on the platform but he and the conductor; that the car stopped; that there were two women and a man waiting to get on; that he does not think that there was another man there; that they got on and the conductor "gave the bell to go ahead;" that then he saw someone come out from behind the pillar and hop on the car just as the car was at the point of starting; that then he saw someone else run out from the street to jump on the car; that this man just got hold of the middle grab iron; that his foot slipped; that he went over against the pillar and dropped; that the conductor "gave the bell to stop" and that the lame man "gave

him the bell" to go ahead; that the lame man told the conductor to stop the car; that the lame man then grabbed the bell cord and "gave two bells;" that the conductor told him to leave the bell cord alone; that the conductor "gave the bell to stop;" that he did not see Gottschalk on the rear platform.

John Kelly testified on behalf of the defendant that he was the motorman on the car; that he remembers "getting the bell to go ahead;" that there was some confusion about the bells; that he "got a bell to stop" and that he "got more bells;" that one bell is the sign to stop immediately; that he did not recall that he started the car with a jerk; that he is almost sure that he did not; that he did not think that they were late.

On rebuttal Gottschalk was recalled by the plaintiff and testified that there was only a negro boy and himself on the rear platform; that Weyhe was not there.

It is obvious that the testimony which we have set out shows that the material facts are directly conflicting and irreconcilable. In such case it is the special province of the jury to determine on which side of the controversy the truth lies. Gainey et al. v. The People, 97 Ill. 270, 275; The People v. Boucher, 303 Ill. 375, 380. The rule is a familiar one that where "there is a contrariety of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony, the verdict will not be set aside." Bradley v. Palmer, 193 Ill. 15, 89; Illinois Central R.R.Co. v. Gillis, 68 Ill. 317, 319.

Counsel for the plaintiff contends that a reversal of the judgment should be granted because of improper cross-examination of the plaintiff's witness, Dr. Otto Jirsa, by the trial attorney for the defendant. The part of the cross-examination that is complained of is as follows;

Attorney for the defendant: "Getting down to these particular passive motions that you said are worth $5 per, how many of them did you administer at each sitting or therapy?"

Attorney for the plaintiff: "I submit that that question is impossible to answer. Does he mean how many times he bent it?"

The Court: "That is what he said. I expect he meant what he said."

Attorney for the plaintiff: "I object to that. I don't think any person would know how many times they bent it."

Attorney for the defendant: "I would bet you I would know if I was charging $5 per."

Attorney for the defendant: "How much did you charge for doing the work himself?"

Dr. Jirsa had testified on direct examination that his bill for his services in connection with the injuries of the plaintiff was $600. On cross-examination he had testified that he had no records in regard to the bill and that he could not testify to the exact number of visits he made to the plaintiff. It will be observed that the court did not rule on the objection of the trial attorney for the plaintiff, and that in the absence of a ruling the objection is not reviewable. Paige v. Illinois Steel Co., 233 Ill., 313, 318; Chicago, Burlington & Quincy R.R.Co. v. Reisch, 247 Ill. 350, 356. But aside from that we do not think there is any error in the cross-examination. The rule is well established that the latitude to be allowed on cross-examination rests largely in the discretion of the trial court, and that a cause will not be reversed unless it is clear that the discretion has been abused. Brennan v. Carterville Coal Co., 241 Ill. 610, 622; Chicago City Ry. Co. v. Creech, 207 Ill. 400, 402, 403.

Counsel for the plaintiff further contends that the

following remarks of the trial attorney for the defendant made during the examination of the plaintiff constitute reversible error:

Attorney for the defendant: "I desire the record to show that this witness walked from his chair to the witness stand without assistance and that he did so without the slightest semblance of a limp."

Attorney for the plaintiff: "Oh, I would not agree to the last part of it."

Attorney for the defendant: "I insist that is a correct statement."

The Court; I did not observe any."

Attorney for the plaintiff: "I did not observe any."

The Court: "Counsel did not observe any."

Attorney for the plaintiff: "I was not looking at him at all when he walked up."

The record does not show any objection by the trial attorney for the plaintiff to the above remarks of the trial attorney for the defendant, or any ruling by the court in regard to the remarks. Paige v. Illinois Steel Co., supra; Chicago, Burlington & Quincy R. R. Co. v. Reisch, supra. Moreover, we think that the contention of counsel for the plaintiff is without merit.

Counsel for the plaintiff further contends that the following questions on the cross-examination of the plaintiff by the trial attorney for the defendant were improper:

Attorney for the defendant: "Will you step down before the jury and show them your hands, please?

A. My hands?

Q. Yes. A. Sure.

Q. No, the other side. Both hands, please, both of them.

(Witness steps before jury box and shows hands to the jury.)

Q. Do you still say that you do not work now?

A. I still say I do not follow up my work, yes.

Q. You get those callouses by sitting around, do you?

A. No.

The Court: He don't sit on his hands, does he?"

As the record does not show any objection by the trial attorney for the plaintiff to the above questions of the trial attorney for the defendant, there is no ruling of the court to be reviewed. Paige v. Illinois Steel Co., supra; Chicago, Burlington & Quincy R. R. Co. v. Reisch, supra.

Counsel for the plaintiff further contends that the following offer of the trial attorney for the defendant to submit the case to the jury constitutes reversible error:

Attorney for the defendant: "If your Honor please, I think on account of the superior intelligence of this jury, and the fact that they have been held over four days beyond their proper time of service, I think they are as competent to decide this case now as they will be after any argument from us. I move that this case be now submitted to the jury, that they may go out and decide upon it without any argument from either counsel, without wasting any further time. *** I ask counsel to agree."

Attorney for the plaintiff: "I certainly agree with counsel. I am sorry that the jury has been kept this extra four days, I am sure; but it is not either counsel's fault or my fault; it is an unfortunate situation. But I would like to say a few words to the jury, and I will try certainly to make it as brief as I can. I realize that they have been held over time."

Attorney for the defendant: "That is, you won't agree to it."

No objection was made by the trial attorney for the plaintiff to the offer of the defendant, and no ruling by the court in regard to the remarks appears to have been made. For that reason the contention of counsel for the plaintiff should not be considered. Paige v. Illinois Steel Co., supra; Chicago, Burlington & Quincy R. R. Co. v. Reisch, supra. Furthermore, both the trial attorney for the plaintiff and the trial attorney for the defendant made arguments to the jury.

Counsel for the plaintiff further contends that the trial court made improper remarks which seemed to indicate that the court was hostile to the plaintiff.

As there were no objections made or exceptions taken to the remarks of the court, counsel for the plaintiff is not in a position to assign error on the remarks. Chicago City Ry. Co. v. Carroll, 206 Ill., 318, 330, 331; Public Service Co. v. Leatherbee, 311 Ill. 505, 508.

Counsel for the plaintiff further contends that the trial court erred in rulings which the court made on the evidence. The objections of counsel for the plaintiff in this respect are merely stated without argument.

One of the objections is that the court refused to allow Dr. Jirsa to testify whether he had heard the plaintiff make any exclamations of pain recently. We do not think that prejudicial error can be assigned on the ruling of the court since the plaintiff testified that he still had pain. Chicago & Alton R. R. Co. v. Walters, 217 Ill. 87, 90; Schattgen v. Reinbeck, 149 Ill., 646, 653.

Another objection of counsel for the plaintiff to the ruling of the court on the evidence is that the court refused to allow Dr. Frank F. Trombly, a witness for the plaintiff, to give his opinion as to whether the injury of the plaintiff was permanent.

Dr. Jirsa, however, was permitted to testify that in his opinion the condition of the knee of the plaintiff was permanent. In view of Dr. Jirsa's testimony we do not think that the ruling of the court constitutes prejudicial error. Chicago & Alton Ry. Co. v. Walters, supra; Schattgen v. Holmback, supra.

Other errors are urged by counsel for the plaintiff to rulings of the court on the cross-examination of the witnesses, John Oscar Johnson and Thomas Walsh. We have examined the objections and are of the opinion that the rulings of the court do not show an abuse of discretion.

Counsel for the plaintiff further contends that the trial court gave an erroneous instruction on behalf of the defendant.

Neither the instruction objected to nor any of the other instructions are preserved in the bill of exceptions. In this state of the record the objection to the instruction should not be considered. Arnold v. Dodson, 272 Ill. 377, 384; Chicago, Burlington & Quincy R. R. Co. v. Reisch, supra; Greenwall v. Hess, supra.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

Mr. Kiro, however, was permitted to testify that in his opinion the condition of the knee of the plaintiff was permanent. In view of Mr. Straw's testimony we do not think that the ruling of the court constitutes reversible error. Pullman [illegible] Co. v. Smith, [illegible] v. Chicago, [illegible].

Other errors are urged by counsel for the plaintiff in findings of the court on the cross-examination of the witnesses John Henry Johnson and Thomas Walsh. We have examined the objections and are of the opinion that the findings of the court do not show an abuse of discretion.

Counsel for the plaintiff further contends that the trial court lost an opportunity instructed on behalf of the defendant.

Neither the instruction objected to nor any of the other instructions are preserved in the bill of exceptions. In this state of the record the objection to the instruction should not be considered. Arnold v. Hudson, 270 Ill. 277, 309; Chicago, [illegible] v. Moore, [illegible] v. Chicago Surface Lines, [illegible].

For the reasons stated the judgment is affirmed.

Affirmed.

McSurely, P. J., and McGoorty, J., concur.

98 - 29185

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| CITY OF CHICAGO, Appellee, vs. ALBERT FELLS, Appellant. | 226 I.A. 639<br>APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Albert Fells, from a judgment in the Municipal court of Chicago, finding the defendant guilty of disorderly conduct and imposing a fine on the defendant of $25 and the costs of the court.

The only question in the case is whether the finding of the trial court is sustained by the evidence.

Counsel for the defendant contends that the evidence does not show that the defendant was guilty of disorderly conduct.

The complaint is based on section 2658 of the Municipal Code of 1922. The substance of the complaint is as follows: That the defendant "did make, aid, countenance, and assist in making an improper noise, riot, disturbance, breach of the peace and diversion tending to a breach of the peace."

The complaining witness, who was a police officer of the city of Chicago, testified on direct examination in substance that on the evening on which the offense is alleged to have been committed he with his wife and daughter went to a theatre and stood in line at the entrance of the theatre waiting to enter the theatre; that he was in civilian clothes; that the defendant was standing in line behind them; that the defendant bought tickets for seven or eight women who were with him; that he, the witness, heard the defendant make several remarks, but that he could not just hear what they were; that just as he, the witness, got to the door he said to the crowd on the east, "As little as you could do over there would

be to let some of us in from this direction; we have been standing here about fifteen or twenty minutes and you have gone in and none of us have gone in;" that the manager of the theatre came out and let him, the witness, and his wife and daughter go in; that after the witness had stepped in the theatre he heard the defendant say that he, the witness, was "only looking after" himself; that the defendant then backed out of line and started to fight with him, the witness; that the defendant struck him several times; that he, the witness, told the defendant that he was a policeman; that he, the witness, put his hand to his back pocket and pulled out his revolver; that someone struck at him from the crowd; that he told the defendant he was under arrest; that finally he and the defendant got out on the sidewalk; that the defendant had his hand around his, the witness', neck; that "they" were crowding on him, the witness; that he, the witness, had the defendant up against the building holding him with his left hand; that the defendant was tussling with him until the parol wagon arrived.

On cross-examination the witness testified that the only thing he said to the defendant before the defendant grabbed him was, "My friend, you ought not to make a remark of that kind;" that the remark that the defendant made was that he, the witness, was only talking for himself.

The wife of the complainant witness testified that while they were standing in line there was a great deal of pushing and that the complaining witness said, "There is nobody over here going in;" that the defendant was talking and talking, and that she said to him, "You had better be still;" that the defendant then said, "He is only talking for himself."

The manager of the theatre testified on behalf of the City of Chicago that he heard the complaining witness tell the crowd to be careful and use a little judgment; that he heard the

defendant say to the officer, "Mind your own damn business, you are in."

The defendant testified that he went to the theatre in question accompanied by five women and two children; that after purchasing tickets he was standing in line and the crowd behind was pushing; that the complaining witness said, "Cut the pushing;" that he, the defendant, said, "I cannot help it if a bunch of children behind me are pushing;" that as the pushing continued he, the defendant, fell against the stand and made a terrible noise; that the complaining witness looked around at him, and that the wife of the complaining witness said something; that the crowd started to push again; that the complaining witness turned to him; that he, the defendant, said, "I cannot help the crowd from pushing and shoving;" that the complaining witness then collared him with his left hand, struck him in the forehead with a pistol and pushed him; that he, the defendant, grabbed hold of the arm of the complaining witness; that he, the defendant, did not know that the complaining witness was an officer until after the complaining witness struck him with the pistol.

The four women who accompanied the defendant testified in substance that the complaining witness was the aggressor; that after he had entered the theatre he came out and attacked the defendant. One of these witnesses testified that after the complaining witness got inside the door of the theatre he said, "Let me get out, I want to get a pull at a fellow on the outside."

From a careful consideration of the evidence we are of the opinion that the evidence is not sufficient to sustain the offense charged in the complaint.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

135 - 39294

JACOB G. LEVINSON,
Appellant,

vs.

N. H. DAVIS,
Appellee.

236 I.A. 639

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, Jacob G. Levinson, from a judgment in favor of the defendant in the Municipal Court of Chicago in an action of forcible entry and detainer.

The principal question in the case is whether the defendant is entitled to the occupancy of a room, designated as room No. 1, in the building owned by the plaintiff. The room was one of several rooms alleged by the defendant to have been leased by the plaintiff to the defendant.

The defendant contends that he was evicted from the room by the plaintiff. The evidence shows that after the alleged eviction the defendant sent the plaintiff $17.50 as rent, instead of $25, the amount named in the lease. The plaintiff refused to accept the $17.50 and commenced the present action to recover possession of the premises.

The plaintiff purchased the building from H. C. Steffey. At the time of the purchase the defendant was a tenant of Steffey under a written lease. The part of the building leased to the defendant was described in the lease as follows: "basement premises ** now fitted out for office purposes with adjaining rooms." This clause in the lease is obviously ambiguous, and oral testimony was admitted by the court to explain definitely the part of the premises intended by the lease.

Steffey testified that he rented to the defendant the "space" he, Steffey, had occupied and that room No. 1 was one of the rooms that he had occupied. The defendant testified that the part of the premises that he rented from Steffey had been occupied by Steffey as a real estate office; that he, the defendant, bought from Steffey the business and equipment, - desks, signs, stationery, - and that the equipment remained as he bought it; that room No. 1 contained signboards, for sale signs, for rent signs, stencils, stencil supplies, placards, tools and things necessary to the real estate office.

Counsel for the plaintiff contend that the above testimony of Steffey and the defendant was inadmissible because the written lease could not be varied by oral testimony. Counsel for the plaintiff are not in a position to assign error on the ruling of the court in admitting the testimony, as the question is not properly preserved for review.

During the examination of Steffey the trial attorney for the plaintiff said: "It is an attempt to change the terms of the lease," but the court did not rule on the objection. The testimony of the defendant was not objected to. But aside from the question whether the objection is saved for review, we think that the testimony was clearly admissible.

The rule is that if a written instrument is ambiguous, evidence of extrinsic facts, which show the construction placed on the instrument by the parties, is admissible. Schneider v. Hankart, 308 Ill., 40, 43, 44; Turner v. Osgood Art Colortype Co., 223 Ill. 629, 635.

On the question of the alleged eviction of the defendant by the plaintiff, two witnesses testified on behalf of the defendant and one witness testified on behalf of the plaintiff.

Mrs. Mary Pierson testified on behalf of the defendant that she was a tenant in the building; that she heard the plaintiff tell another tenant, Mrs. Marie Madden, that she, Mrs. Madden, could put her furniture in room No. 1; that the building belonged to him, the plaintiff, and not to the defendant; that Mrs. Madden moved her furniture into the room.

Mrs. Marie Madden testified that she was a tenant of the building; that when she moved into the building she asked the agent of the plaintiff if there was a storeroom; that a girl in the building told her to put her things in the storeroom (Room No. 1); that Mrs. Pierson said, "You cannot put your things down there; it is not your room;" that she, the witness, said "it is our room; we were told it was our room;" that she, the witness, went to see the plaintiff about the matter; that the plaintiff went to the building and said, "You go ahead and use that room. Who is Mr' Davis (the defendant) anyway? I am the owner of the building;" that she, the witness, went ahead and put her things in there and that they have been there ever since.

The plaintiff testified that Mrs. Madden came to see him and told him she had some furniture in the storeroom (Room No. 1); that Mrs. Pierson had told her to move the furniture out as the defendant had told Mrs. Pierson not to let anybody in the room; that he, the plaintiff, went to the building to see what was the trouble; that he said, "Well, I do not know exactly. There is storage room in the basement. If you will see the janitor, possibly he will tell you which room;" that that was all he said and that he left; that he did not tell Mrs. Madden she could put her goods in the room regardless of what the plaintiff said.

We are of the opinion that the finding of the court was correct and that the judgment should be affirmed.

AFFIRMED.

McGurely, P. J., and Matchett, J., concur.

156 - 29248

J. M. BONGA,
Appellee,

vs.

THE BOND & MORTGAGE COMPANY,
a Corporation,
Appellant.

236 I.A. 640

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, The Bond & Mortgage Company, from a judgment in the Municipal court of Chicago, in favor of the plaintiff, J. M. Bonga, in an action of replevin brought by Bonga to recover possession of a bond described as a Humphrey Bond, with nine interest coupons of $17.50 each attached to the bond. After the action of replevin was begun the plaintiff filed a statement of claim alleging that the defendant had converted the bond to its own use.

The material facts are not in dispute. All of the facts leading up to the time that the defendant became connected with the matter of the bond do not clearly appear from the evidence. The plaintiff had some business dealings in regard to the purchase of a bond with Charles L. Caswell, who was presumably engaged in the real estate or bond business. The plaintiff gave $495 to Caswell as a payment for "a bond" apparently a "Johnson Industrial" bond, which Caswell was to deliver to the plaintiff. Caswell did not deliver a bond to the plaintiff. The plaintiff made repeated demands on Caswell for the delivery of a bond. When the plaintiff would demand a bond, the plaintiff says that Caswell "kept putting me off." While the matter of the bond was in this situation Caswell went to work for the defendant, The Bond & Mortgage Company, as a salesman. After this the plaintiff went to

see Caswell at the office of the defendant, and again demanded that Caswell deliver him a bond. Caswell said that he did not have "the Johnson Industrial bond," but that he had a bond "just as good if not better," and that "it brings 7 per cent." The plaintiff took the bond and signed a receipt for it. The bond was the bond which we have previously referred to as the Humphrey bond. The bond was obtained by Caswell from the secretary of the defendant, and when Caswell got the bond he told the secretary that he wanted it in order "to show it to a customer." Caswell signed a receipt and written agreement in respect of the bond when it was delivered to him by the secretary. We shall discuss this receipt and agreement later. The plaintiff got the bond from Caswell in January, 1923. In "the winter" of 1923 William McCullough, the assistant treasurer of the defendant, at the direction of Miss Ida Wagner, the secretary of the defendant, went to see the plaintiff, gave the plaintiff a card of the defendant on which the name and official title of the assistant treasurer appeared, inquired of the plaintiff if he had received the bond from Caswell, and informed the plaintiff that Caswell had never paid the defendant for the bond. The plaintiff told McCullough that he had given Caswell money for a bond; that he had "been after Caswell" and Caswell had given the bond for the money he had paid Caswell. The plaintiff asked McCullough to give him a bill of sale for the bond, but McCullough said he could not do it because the bond had not been paid for. When the plaintiff told McCullough that he had bought the bond from Caswell, according to the testimony of the plaintiff, McCullough said, "That is all right. We want to keep track of our bonds." Subsequent to the conversation with McCullough, the plaintiff on May 9, 1923, presented one of the interest coupons of the bond to the defendant, and the defendant paid the coupon. On August 30, 1923, the plaintiff went to the office of the defendant, saw Miss Ida Wagner, the secretary of the defendant, and asked her

if the company would be willing to repurchase the bond. Miss Wagner told him that the company would try to get a customer for him. The plaintiff gave the bond to Miss Wagner and got a receipt for it. The defendant has had the bond in its possession ever since. Prior to beginning the present action the plaintiff made a demand on the defendant for the return of the bond.

Counsel for the defendant contends that the bond was stolen by Caswell from the defendant; that "it is elementary that no one can give good title to a stolen chattel;" that "for the convenience of commercial transactions, an exception to this rule is made when the article stolen is currency or a negotiable instrument;" that therefore the plaintiff did not acquire title to the bond unless the bond was negotiable and was purchased by the plaintiff in good faith before maturity; that the bond was not negotiable; and that the plaintiff did not purchase the bond in good faith as an innocent purchaser.

We recognize the general rule that "no person can by his sole transfer to another the right of ownership in a thing in which he has not the right of ownership," except in the case of cash, bank bills, checks and notes payable to bearer or transferable by delivery in the ordinary course of business to a person taking the same bona fide and paying value for it." Erwin v. Ladrange State Bank, 363 Ill., 330, 335. But we are of the opinion that the bond was not stolen from the defendant by Caswell, and that Caswell has not committed any criminal offense; that the bond was obtained by Caswell from the defendant as a salesman for the defendant; that the plaintiff received the bond from Caswell in such circumstances as reasonably to induce the plaintiff to believe that Caswell was authorized to deliver the bond to the plaintiff; that the plaintiff therefore acquired a lawful title to the bond. Furthermore, we are of the opinion that the act of Caswell in delivering the bond to

the plaintiff was ratified by the defendant, and the ownership of the bond by the plaintiff was acknowledged and acquiesced in by the defendant.

In this view the question of the negotiability or the non-negotiability of the bond is immaterial.

Our conclusions are fully sustained by the facts and by well established principles of law applicable to the facts. Caswell was a bond salesman for the defendant. There is no dispute about that fact. McCullough, the assistant treasurer of the defendant testified explicitly that Caswell "was selling bonds for us." Caswell obtained the bond in question from Miss Wagner, the secretary of the defendant, in the usual course of business. There is not the slightest evidence that Caswell wrongfully gained possession of the bond as the result of a conspiracy with Miss Wagner, nor is there any evidence tending to show that the act of Caswell in obtaining the bond constituted either larceny or embezzlement. On the contrary the receipt and agreement which Caswell signed when the bond was delivered to him by Miss Wagner relieved the transaction of any criminal feature. The receipt and agreement are as follows:

"THE BOND & MORTGAGE COMPANY,
Suite Six Hundred, Eleven S. LaSalle St.,
Chicago, Illinois.

Chicago, Jan. 3rd, 1923.

Received from The Bond & Mortgage Company the undermentioned property in trust; to be returned or satisfactorily accounted for by Jan. 5th, 1923,

Humphrey Bond No. 284.

We hereby agree that we are and will be the bailee of said property for you, and upon demand we will forthwith return it to you; or, at your request, we will forthwith turn over to you the total proceeds of said property, which shall be at least the full and true value thereof; or, upon demand, we will forthwith deliver to you the equivalent for said property of a kind, character and value entirely satisfactory to you, to be held and disposed of by you in the place of said property so delivered to the bearer for us.

$500. C. L. CASWELL."

The receipt and agreement were in printed form, showing thereby that they were not prepared especially for the transaction in question, but that they were merely in the ordinary form used by the defendant in the course of its business. It will be observed that the agreement does not require the return of the specific bond, but only the return of the proceeds of the bond, or the delivery of property which shall be "the equivalent" of the bond, and "of a kind, character and value entirely satisfactory" to the defendant. According to the well settled rule such an agreement is not a bailment, but a sale, and the obligation created is a debt. Lonergan v. Stewart, 55 Ill. 44, 49; The First National Bank of Elgin v. Schwesn, 127 Ill. 573, 578; Chickering et al. v. Bastress et al., 130 Ill. 206, 215; Independent Brewing Association v. Cooke Brewing Co., 169 Ill. App. 347, 351.

There is no evidence in the case at bar from which reasonably it can be inferred that when Caswell obtained the bond from Miss Wagner and delivered it to the plaintiff, that Caswell had a fraudulent intent to appropriate the bond to his own use and did not intend to comply with the conditions of the agreement. His statement to Miss Wagner that he wanted the bond to show it to a customer is not sufficient to justify the inference that he intended to fraudulently appropriate the bond to his own use, and not to comply with the terms of the agreement. And the mere fact that he delivered the bond to the plaintiff did not, in itself, constitute a fraudulent conversion on the part of Caswell. He had a legal right under the agreement to deliver the bond to the plaintiff. In so doing Caswell did not violate the terms of the agreement. A breach of the agreement would only arise if he did not make return of the property to the defendant equivalent in value to the bond.

On the record in the case at bar we are of the opinion that the legal relation between Caswell and the defendant was one of debtor and creditor. It follows, as we have previously stated, that

Caswell did not steal or embezzle the bond from the defendant, and that consequently the defendant cannot retain possession of the bond on the theory that the bond was stolen from the defendant by Caswell, and that, therefore, the defendant never lost title to the bond.

We are further of the opinion that whatever construction may be placed on the act of Caswell in obtaining the bond from the defendant, whether criminal or fraudulent, the defendant is not entitled to the possession of the bond, since the evidence on behalf of the defendant clearly shows that the defendant ratified the act of Caswell and acknowledged that the plaintiff was the owner of the bond. The evidence in this respect has been previously referred to, but we shall state it more in detail. The plaintiff received the bond from Caswell about January 3, 1923. After that Miss Wagner, the secretary of the defendant, sent McCullough, the assistant treasurer, to see the plaintiff. McCullough testified that he saw the plaintiff "in the winter" of 1923. The examination of McCullough in respect of his visit to the plaintiff is as follows:

> "Q. Did you see Mr. J. M. Benga in January, 1923, with reference to a bond?
> A. I would not say whether it was January or not. I saw him in 1923 in the winter time. I went out to see Mr. Benga; Miss Wagner sent me out there.
> Q. Did you see Mr. Benga? A I saw him and talked to him.
> Q. Give the conversation.
> A. I asked Mr. Benga if Mr. Caswell delivered a bond to him, and he said Mr. Caswell had and he wanted to have it cashed and I told him --
> Attorney for the defendant: What was said?
> A. Why, there was nothing said. I told him Mr. Caswell never paid us for the bond. Mr. Benga said that he had given Mr. Caswell money and he never had received any interest or principal; that he was after Mr. Caswell and Mr. Caswell had given this bond for money that he had paid him before that time, and he wanted a bill of sale for the bond, and I told him that I would not get it for him, we could not give it to him, but that he had to get after Mr. Caswell for the bond, that we would not--as
> Attorney for the defendant: Mr. Benga asked for a bill of sale from the Bond & Mortgage Company?
> A. He asked for a bill of sale. I told him it was impossible, to go and take it up with Mr. Caswell and pay for the bond and I would be glad to do it for him. He said that he had

never received the interest or principal and he would be glad to lose the interest if he was given the principal."

Cross-examination by the attorney for the plaintiff:

"Q. In this conversation when you went out to see Mr. Bonga, did you go out at his request, or at whose request did you go out to see him?
A. Miss Wagner's request.
Q. Miss Wagner told you Mr. Bonga had bought the bond?
A. She said she thought that he had it.
Q. When you went out there he told you he did have it?
A. Yes.
Q. And he told you he got it from Mr. Caswell?
A. From Mr. Caswell.
Q. And Mr. Caswell was connected with the Bond & Mortgage Company?
A. He was selling bonds for us.
Q. And he was in their office and he told you that he paid Mr. Caswell for that bond?
A. He said he had given money to Mr. Caswell for the bond.
Q. And then Caswell had the money?
A. That he had paid to Caswell ---
Q. Did he get a bill of sale from the company?
A. Not from the company.
Q. What reason did he give you?
A. To show that he owns the bond.
Q. He had the bond in his possession, didn't he?
A. He had the bond in his possession.
Q. You didn't come out and ask him to return the bond, did you?
A. No, I did not."

At the time of the above conversation between McCullough and the plaintiff, Caswell was still in the employ of the defendant. Caswell did not leave the employ of the defendant until about April 8, 1923.

On May 9, 1923, the defendant paid the plaintiff $17.50 as interest on one of the coupons attached to the bond. On August 30, 1923, the plaintiff went to the office of the defendant and had a conversation with Miss Wagner, the secretary of the defendant, in reference to the bond. The examination of Miss Wagner in this regard is as follows:

"Attorney for the defendant: Miss Wagner, did you ever have a talk with Mr. Bonga, the plaintiff in this case, when he brought the bond back to the Bond & Mortgage Company?
A. He came in and asked me whether I would be willing to repurchase the bond if he brought it in, if I could get him a purchaser?
Q. Did he bring it in?
A. Yes, he brought it and I gave him a receipt for the bond. That is, we take care of bonds that have been sold by the company."

Cross-examination by the attorney for the plaintiff:

"Q. The first time he spoke to you did he have the bond with him?
A. He did not.
Q. In that conversation he made inquiries about your selling the bond for him?
A. No, he asked me whether we would repurchase it.
Q. Whether the Bond & Mortgage Company ---
A. Yes.
Q. Did you tell him that you would?
A. I did not; I told him we would try to get a purchaser for him.
Q. What did you say about the bond?
A. I said if he would bring it in we would try to get a purchaser.
Q. Well, he came back, did he, after that, with a bond?
A. He came back the next day.
Q. And left the bond with you for the purpose of having you secure a purchaser for him?
A. Yes, sir.
Q. And the bond has been in your possession ever since?
A. Yes, sir.
Q. You never did return it to Mr. Benga?
A. No.
Attorney for the plaintiff: That is all.
The Court: When did he give you the bond for sale?
A. When did Mr. Benga give it?
Q. Yes, I mean the actual bond, when did he bring that in?
A. I don't remember just the date, he had a receipt for it.
Attorney for the defendant: The date of the receipt will show.
A. The date of the receipt is correct. ***
Q. You knew on January 3rd, 1923, or you knew from January 3rd, 1923, all the time up to August 30th, 1923, that this particular bond was in the possession of Mr. Benga, didn't you?
A. Yes, sir.
Q. All that time?
A. Yes, sir.
The Court: Q. You did?
A. Yes, sir."

Miss Wagner further testified that there was a dispute between the defendant and Caswell in regard to Caswell's compensation from the defendant. Miss Wagner's testimony in this respect is as follows:

"Q. When did he come to the Bond & Mortgage Company?
A. Right in November, 1922.
Q. And during that time you had accounts against Mr. Caswell and Mr. Caswell was making some claims for commissions due him?
A. Yes, sir.
Q. There were contra accounts and charges, and that accounting has never yet been adjusted?
A. Not entirely."

Counsel for the defendant further contends that the amount of the judgment, namely, $657.50, is incorrect; that "the

court might be correct in assuming that the bond is worth $500, but the trial court entered judgment for $500 plus the nine interest coupons of $17.50 each;" that the bond does not mature until November 9, 1927, and that all of the interest coupons had not become due and payable at the time the judgment was entered.

We think that the amount of the judgment is incorrect, and that the correct amount should be $500 plus interest at the rate of seven per cent per annum from November 9, 1922, the date of the issuance of the bond, to January 26, 1925, the date of the judgment in this court, less $17.50, which was the amount paid to the plaintiff for one of the interest coupons. The interest from November 9, 1922, to January 26, 1925, amounts to $77.58. Deducting $17.50 from this amount and adding $500 to the remainder, we have $560.08.

The judgment for $657.50 is reversed; and as the case was tried without a jury judgment will be entered in this court in favor of the plaintiff in the sum of $560.08. The costs of this appeal will be taxed against the defendant.

JUDGMENT REVERSED AND JUDGMENT
ENTERED FOR $560.08.
560.08

McBurely, P. J., and Matchett, J., concur.

245 - 28903

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|---|---|
| WINFIELD M. SCHERDORF and OSCAR H. BOENICKE, Appellants, vs. MARGARET J. AYERS, Appellee. | 223 I.A. 340 APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiffs below, who appeal from a judgment in favor of the defendant, entered upon the verdict of a jury, filed a statement of claim alleging that defendant was indebted to them in the sum of $750, for commissions as real estate brokers, on account of services rendered in finding a purchaser ready, willing and able to purchase certain real estate of the defendant known as 4727-29 Lake Park avenue, Chicago, Illinois.

The affidavit of merits alleged in substance that plaintiffs were employed upon the representation made by them to defendant that they never claimed commissions where a sale was not consummated; that in the particular instance on account of which plaintiffs sue, the sale was not in fact consummated. Further, that plaintiffs were informed prior to the transaction in controversy that defendant's price for her property was $30,000, and that through other brokers she had contracted to sell it for that amount, which sale, however, the purchaser had refused to consummate, and the plaintiffs advised defendant to make the contract of sale (on account of which the suit is brought) through plaintiffs, and thus establish her loss, when she could sue for and recover the difference, which would amount to the sum of $5,000, the contract in the instant case being an agreement to sell and buy at the price of $25,000.

The affidavit of merits further averred that defendant

was advised to do this by plaintiff's attorney, who notified the brokers in the first sale, but never in fact brought any suit.

Further, that defendant informed plaintiffs that she might not be able to deliver possession of the property, because a tenant then in possession refused to surrender it; that plaintiffs, however, promised that they would have their attorney put the tenant out of possession and that there would be no difficulty in obtaining possession in closing the deal, which they undertook but failed to do; that the purchaser thereupon refused to carry out the contract; that the said tenant is still in possession and refuses to yield it; that defendant relied on the advice of plaintiff and their attorney in these respects, in which they failed to perform; and that the alleged purchaser was therefore not ready, willing and able to purchase the property.

The evidence as to the respective contentions of the parties was submitted to a jury, with the result already indicated. Plaintiffs, however, now contend that, notwithstanding the evidence submitted as to the alleged agreement that defendant is bound as a matter of law because she signed a contract agreeing to sell to the prospective purchaser, and plaintiffs cite a number of cases, including Fox v. Ryan, 240 Ill., 391; Dennis v. Walters, 123 Ill. App. 93; Tackett v. Fawley, 130 Ill. App., 97; Schulte v. Meehan, 133 Ill. App., 491, all of which are, however, easily distinguishable on the facts from the instant case. There is no merit whatever in this contention.

It is further argued, however, that the court erred in refusing to receive material evidence offered in behalf of the plaintiff, and such evidence is stated to be questions as to whether Mr. Hagan, who represented defendant in a suit brought to dispossess the tenant, was the attorney and agent of plaintiffs or defendant, and also questions tending to show why defendant did not

recover possession in the suit brought by her for that purpose or recover damages from the first vendee.

It is also contended that the court erred in refusing to receive in evidence certain statements made by defendant at the trial of the forcible detainer suit. The plaintiffs do not specifically point out the particular part of the record in which these supposed errors appear, and we have therefore been compelled to examine practically the entire abstract of the evidence in the consideration of these contentions. We find, upon such examination, that no material evidence bearing upon the issues was improperly excluded; that, as a matter of fact, plaintiffs attempted to bring out these matters upon cross-examination of the plaintiff, which the court properly refused to permit because the matters to which the questions related had not been testified to or defendant questioned concerning the same on her original examination.

Other questions of which plaintiffs complain were properly excluded because they were offered in rebuttal. Plaintiffs complain bitterly because the court would not allow proof of a conversation between defendant and Mr. Hagan, who was then acting as her attorney, at the request of plaintiffs, concerning a check which defendant received from her tenant to apply on rent of the premises for the month of October. It is the theory of plaintiffs that the acceptance of this check prevented the recovery of possession in the forcible detainer suit. The check in question, however, was paid October 4, 1928, ten days before the agreement between plaintiffs and defendant was made, and these facts are uncontradicted. The evidence was therefore immaterial, but as a matter of fact the record shows that defendant was examined at length in regard to the check, and that Mr. Hagan was also permitted to testify to his version of that transaction, and the facts so thus testified to were permitted to go to the jury. Conversations at the time of the trial of the

forcible detainer suit alone were excluded, and we think properly, for the reason that the questions asked were not proper upon cross-examination, as were also other questions excluded by the court of which complaint is made, namely, as to whether defendant consulted Mr. Hagan before the dealings with plaintiffs with reference to the matter in controversy, and whether defendant directed Mr. Hagan to dismiss a suit theretofore started by her on the so-called Carrel contract.

It is also urged that the court erred in excluding questions as to whether defendant discharged Mr. Hagan in the forcible detainer suit and took her papers from him before the motion for a new trial came up.

While these questions were excluded and properly, upon cross-examination, the facts were testified to by the parties, and the evidence went to the jury. There was, therefore, no error in this respect.

It is next contended that the court erred in denying a motion of plaintiffs to withdraw a juror and continue the case because of improper conduct on the part of the defendant's attorney. The specific objection made is that the attorney for the defendant in the course of her examination put to defendant this question:

> "Q. How many months' rent on that property had been tied up by this attachment proceeding?
>
> Objection By Hagan.
>
> The Court: What is the purpose?
> Mr. Skinner: I withdraw the question."

The undisputed evidence shows that defendant was a resident of Wisconsin and that this suit against her was begun by attachment. The plaintiffs' contention is that the jury were prejudiced by this conduct of the attorney. We are unable

to see in what respect intelligent jurors (which we must presume these were) could have been unduly influenced by anything that occurred in this connection, and are inclined to agree with the suggestion of defendant that this is "Much Ado about Nothing."

The plaintiffs also argue at length that the court erred in the giving and refusing of instructions. While we do not think there was material error in this respect and although some of the instructions may have been subject to criticism, we do not think these objections ought to be considered on this record, for the reason that objections of plaintiffs thereto, where made at all, were not specific. From several decisions of this court it appears that Rule 8 of the Municipal court, which was made a part of the record in those cases, provides in substance that objections to the giving or refusing of oral instructions to the jury must be specific and must be made immediately upon the conclusion of the charge and before the jury retire. (See Grollman v. Lake Geneva Co., 147 Ill. App., 333; Lichtenhan v. Prudential Ins. Co., 191 Ill. App. 412; Interstate Finance Corporation v. Commercial Jewelry Co., 201 Ill. App. 280). The rules of that court are not made a part of this record. We are, however, of the opinion that where repeated decisions show the existence of such a rule, and the statute authorizes the Municipal court to make the rule, this court will presume the continued existence of the rule in the absence of an affirmative showing that it has been changed. (See Iobitz v. Chicago City Ry. Co., 192 Ill. App. 493). Irrespective of this view of the situation, however, we are of the opinion that this rule merely states the practice at common law where oral instructions are given. As we understand that practice, it is necessary where it obtains irrespective of any rule of court that the objections to the giving or refusing of instructions should

[illegible] the jury in order

that the court giving instructions may have the opportunity to correct any supposed error.

It is also claimed that the court erred in refusing to give certain written instructions requested by plaintiffs. It is not, as we understand it, however, error where the court elects to instruct orally to refuse such written instructions even though the same should be correct and applicable to the facts in the case. Baker v. Aron & Sons, 183 Ill. App. 100; Howe v. Fulton, 225 Ill. App. 539. It is also argued that the court erred in setting aside a directed verdict upon the attachment and quashing it because plaintiffs failed in the main issue on the merits. There was no error in this respect, as that is the proper practice. Where the original action fails, the attachment too must necessarily fail. Moore v. Hamilton, 2 Gilm. 439. We are satisfied upon this record that substantial justice has been done, and the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

79 - 29166

236 I.A. 640

R. J. LOOCK & COMPANY,
(a corporation),
Appellee,

vs.

SIMPLEX CORPORATION,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff, who is appellee in this court, sued the defendant in its statement of claim, setting up in hæc verba a written contract dated September 6, 1921, wherein defendant ordered from plaintiff 100,000 Lightnin Ford Fan Pulley Pins to be delivered f.o.b. Baltimore, Maryland, for an agreed price. The statement alleged that the pins were manufactured, and 25,000 thereof delivered, and that 75,000 pins were on hand at Baltimore subject to the order of defendant, but that defendant refused to pay for the same, whereby there was due to plaintiff the sum of $6,024 with interest thereon from September 15, 1921.

The affidavit of merits admitted the execution of the contract, denied the purchase of 100,000 pins, admitted that plaintiff had ordered 25,000 pins which had been delivered but returned to and accepted by plaintiff. It also set up alleged false representations in the making of the contract.

Evidence was offered by the parties and the cause submitted to a jury which returned a verdict for the plaintiff in the sum of $2,500, upon which the court, overruling motions for a new trial and in arrest of judgment, entered judgment.

The defendant urges that the statement of claim did not state a cause of action, but we think there were no defects therein which were not cured by the verdict.

It is further urged that the verdict is inconsistent with the evidence, and we think this contention must be sustained.

There was evidence from which the jury might have properly found that the defendant gave the order for 100,000 pins and that 25,400 of these pins were made and delivered to it, and that the same had not been paid for. The jury could also properly have found from the evidence that, while there was an offer on the part of defendant to return these pins, the same were not returned. Calculating at the price named in the contract, the jury could further have found from the evidence that defendant was indebted to plaintiff in the sum of $1,524 for these pins.

But the uncontradicted evidence shows that the 75,000 additional pins made were not delivered to the defendant, and further that plaintiff, prior to the beginning of this suit, through its attorneys, wrote to the defendant that it had "concluded to make other disposition of the goods which have never been shipped." Whether these 75,000 pins have been sold and if so whether at a profit or loss does not appear from the evidence. There is no evidence in the record sufficient to bring the case within the rule laid down in Santa Rosa-Vallejo Tan Co. v. Kronauer Co., 228 Ill. App. 339. It is wholly impossible to determine from the evidence on what theory the verdict for $2,500 was returned by the jury or permitted by the court to stand. A new trial should have been granted. Tilley v. Spalding, 44 Ill. 80; Chicago City Ry. Co. v. Reed, 206 Ill. 174; Hubbell v. Heidrich, 142 Ill. App. 464; Conrad Seipp Brewing Co. v. Peck, 85 Ill. App. 657; Galamopoulos v. Petropoulos, 147 Ill. App. 1; C.B. & Q.R.R. Co. v. Gregory, 58 Ill. 272; Street Railway Company v. Hughes, 188 Ill. App. 186.

For the reasons indicated, the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

See supplemental Opinion on petition for rehearing filed February 9, 1925.

141 - 29230

ELIZABETH KAPHAN, Administratrix of the Estate of Orla W. Kaphan, Deceased,

Appellee,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO. and NICHOLAS MORETH.

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MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO.,

Appellant.

236 I.A. 640

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The Railroad company, defendant in the trial court, appeals from a judgment in the sum of $10,000 entered upon the verdict of a jury, after motions for a new trial and in arrest of judgment had been overruled. The action was in case and the plaintiff sued as administratrix of the estate of her deceased husband and for the benefit of his heirs at law and next of kin. She joined as a defendant one Nicholas Moreth.

The declaration in its several counts alleged that the deceased met his death on November 19, 1921, at the intersection of Lee street with the tracks of the Railroad company in the Village of DesPlaines, Cook County, Illinois, while riding as an invited guest in an automobile which was owned and driven by the defendant Moreth. In the several counts the declaration alleged joint negligence of Moreth and the Railroad company whereby the automobile was struck by a passenger train of the company which was being run through the village at a rate of speed forbidden by a valid ordinance.

Defendant filed the general issue with certain special pleas which were afterwards withdrawn, a stipulation having been filed which provided that the defendant company

might give evidence upon the trial of any matters which might have been put in issue by special plems.

I. It is urged as a reason for reversal that there was a fatal variance between the averments of the declaration and the proofs submitted on the trial. (a) In that, while the declaration averred that plaintiff's intestate at the time of receiving his injuries was riding as an invited guest in the automobile of Moreth, the proof failed to establish the fact that he was such guest. (b) In that, while the several counts of the declaration alleged joint negligence, the verdict of the jury found only several negligence of the Railroad company.

As to the first supposed variance, the evidence tended to show that Moreth, the owner and driver of the automobile, was a member of the Chicago Motor Club; that a suit at law in which he was interested was pending at DesPlaines upon the day on which the accident happened; and that he arranged to have the Chicago Motor Club furnish an attorney to defend the case. The attorney furnished by the Club was Mr. Brodski, and for the purpose of carrying him to LaGrange Moreth drove to the Motor Club on the day in question. Plaintiff's intestate was at that time in the employ of the Club, and was a student of the law, not yet admitted to the bar. It was suggested that he should go to DesPlaines with Moreth, and with the knowledge and apparently the consent of Moreth he did so.

The defendant contends that under this state of facts the relationship of employer and employee must be held to have existed between Moreth and the deceased, and that Moreth, Brodski and Kaphen were engaged in a common enterprise and were upon a joint mission at the time the accident occurred. As supporting this contention Wabash Western Ry. Co. v. Friedman, 146 Ill. 583, and Carlin v. City of Chicago, 262 Ill., 564, are

cited.

We doubt whether the allegation in the declaration that the deceased was riding in the automobile "as an invited guest" may be considered material. Whether he was riding as a guest or as an employee or as one engaged in a joint enterprise, the same rules would, we think, apply as to the necessity of the defendant using ordinary care and of the deceased being in the exercise of due care for his own safety. If the allegation was not material it may be regarded as surplusage, and it would seem that the supposed variance, even if it existed, would be likewise immaterial. That this is the rule has been decided in many well considered cases. Chicago Union Traction Co. v. Brethauer, 223 Ill., 521; C. & A. R. R. Co. v. Wise, 206 Ill. 483; E. St. L. Con. Ry. Co. v. Altgen, 210 Ill., 413; Postal Tel. Co. v. Likes, 225 Ill. 249; Chicago & Gr. Trunk Ry. Co. v. Spurney, 197 Ill., 471. These cases all follow the rule theretofore laid down in Chicago West Div. Ry. Co. v. Mills, 155 Ill. 63, where the court said:

> "A party is not bound to prove matters which are merely surplusage. If the proof does not correspond with such matters, the variance is immaterial. If the whole of an averment may be stricken out without destroying the plaintiff's right of action, it is not necessary to prove it."

The tests seem to be that allegations which are descriptive of the identity of the thing which is legally essential to establish the claim or charge, or allegations which set forth the contract out of which the duty arises, which it is claimed was violated or omitted, are material and essential and must be proven as alleged. Otherwise, proof is unnecessary. We think the evidence was entirely consistent with the theory that the deceased was riding in Moreth's car as an invited guest, but if not, then at any rate we hold that the allegation was not material.

As to the second alleged ground of variance, namely, that the negligence alleged was joint, while that proved was several, this also was, we think quite immaterial since an examination of the declaration discloses that, if the allegations as to specific negligence on the part of Moreth were stricken out, the declaration would still state a good cause of action. The charges in the declaration were, we think, clearly divisible and the proof of the part made sufficient to sustain a judgment against the defendant. Guianios v. DeCamp Coal Co., 242 Ill., 278; Barnes v. Northern Trust Co., 169 Ill., 112. The cases cited, supra, we think are sufficient on this point, even if it be conceded that the point has been preserved on the record. Smith v. Kewanee Light & Power Co., 196 Ill. App. 118.

II. In the next place, it is contended on behalf of the Railroad company that the court erred in admitting in evidence the ordinance of the Village of DesPlaines; in the first place, because it was not properly proven, and in the second place because it was unreasonable. Section 14 of chapter 51, Smith-Hurd Illinois Rev. Stat. 1923 provides in substance that ordinances or parts thereof of any city, village, town or county may be proved by a copy thereof, certified under the hand of the clerk or the keeper thereof, or the corporate seal, if there be any; if not, under his hand and private seal.

The plaintiff upon the trial offered in evidence two sections of an ordinance which provided that no railroad corporation should, by itself, agents or employees, run any passenger train upon or along any railroad track within the corporate limits of the village of DesPlaines at a greater rate of speed than fifteen miles an hour; nor should any such corporation, by itself, agents or employees, run any freight car or cars upon or along any railroad track within said village at a greater speed than ten miles an hour.

The ordinance further provided that the bell of such locomotive engines should be rung continually within sixty rods of any street crossing the track upon which said locomotive was so running, within the limits of the village. Attached to these sections of the ordinance was the certificate of the village clerk under the seal of the village, stating "that the foregoing is a true and correct copy of a certain excerpt from an ordinance now on file at my office, which ordinance was passed by the Village Board of Trustees of the Village of DesPlaines, Cook County, Illinois, on December 19, 1898, and approved on the same date by the President of the Village of DesPlaines, Cook County, Illinois. I do further certify that the said excerpt from the said ordinance has been in full force and effect from said date to the present time and has not been repealed."

It is urged that an "excerpt" is not the equivalent of a "part," and that there is therefore no basis upon which an excerpt of an ordinance may be offered in evidence. This seems hypercritical.

We think it would hardly be possible to conceive of an "excerpt" taken from an ordinance which was not a part of the ordinance from which it was taken. It is true that the word "excerpt" is much narrower in meaning than the word "part" in that the term "excerpt" is properly applied only to literary documents or to a written or printed work, but the statute in question evidently makes use of the word "part" in its narrow sense. We think the word "excerpt" as used in this connection is the equivalent of the word "part" as used in the statute. The "excerpt" was therefore properly received in evidence.

It is next claimed that the certificate of the clerk was defective in that it failed to show that the ordinance (which was punitive) was published. The sections of the ordinance which were received in evidence did not specifically impose a penalty for its violation; but defendant points out that, under the provisions of

section 103 of chapter 114, Illinois Rev. Stat., Cahill, 1923, page 2785, the violation thereof subjected the violator to a penalty. However, it developed upon the hearing that a pamphlet containing the ordinances in question was in the possession of an investigator for the defendant Railroad company, and upon a demand by plaintiff for the production of the pamphlet, counsel for the defendant stated: "I know that there is in existence a pamphlet containing the ordinances of the Village of DesPlaines, among others the sections heretofore introduced in evidence by the plaintiff, and that the pamphlet, on its face, purports to have been published by authority of the village. I am willing now to agree, because we cannot produce it at this instant, and I do not want to foreclose Mr. Bliss having it in the record. I agree it may be offered in evidence by him, now subject to the objections I made to the introduction of the other sections, and agree it might be read into the record, copied into the record, photographed into the record, or put in in any way he wants to in any time that it is required in this case in this court or in any other court." We think this statement amounted to an admission of the publication of the ordinance as introduced.

It is next urged on defendant's behalf that the ordinance was unreasonable and therefore improperly admitted in evidence. It appeared from the evidence that the train which injured the plaintiff's intestate was engaged in interstate commerce, but a similar ordinance with like restrictions was held not to be unreasonable by our Supreme Court in Soucie v. Payne, 299 Ill. 552.

III. The next contention of the defendant is that improper and misleading instructions were given by the court on behalf of the plaintiff and proper instructions were refused which were offered in behalf of the defendant. Particularizing, the defendant complains of instruction No. 1, which told the jury that, if they believed from a preponderance of the evidence that the

deceased received injuries within the corporate limits of the Village of DesPlaines, resulting in his death by a passenger train of the defendant, while he was in the exercise of ordinary care for his own safety, and that the defendant company was at the time running this passenger train at a greater rate of speed than fifteen miles an hour, then the law would presume that the death of the deceased was caused by the negligence of the defendant Railroad company. It is claimed that this instruction was misleading. The exact instruction has been approved by the Supreme Court in two similar cases, namely, Dukeman v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 237 Ill., 104, and Gibbons v. A. N. M. C. R. R. Co., supra. Instruction No. 2, which is also complained of, is in the language of the statute, and the practice of giving instructions in the language of the statute has been approved in Ward v. Meredith, 220 Ill., 86. It is claimed that instruction No. 3 for plaintiff was defective because it did not state that the jury must find from the evidence that the negligence of the Railroad company was the proximate cause of the injury, and because it took from the consideration of the jury the question of whether the negligence of Moreth was the sole proximate cause of the injury. The instruction was as follows:

> "The court instructs the jury that if they believe from a preponderance of the evidence that Moreth, the driver of the automobile, was negligent in the operation of his automobile, and defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company was guilty of negligence in manner and form as alleged in the declaration, and that the negligence of each contributed to the injuries and death of the deceased, and if the jury further believe from the evidence that the deceased, Orla N. Kaphen, was exercising ordinary care for his own safety, then the negligence of Moreth would not relieve the defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company from liability."

In view of the fact that the undisputed evidence indicated that the defendant Railroad company was operating its train at a speed of from forty to fifty miles an hour at the time of the injury, we do not think it can be held that there was error in

this instruction. The question of proximate cause was fully covered by several other instructions given, and the instructions must be considered as a whole in cases where, as here, a verdict is not directed.

It is also urged that the court erred in refusing instruction No. 20, which was requested by the defendant. It was as follows:

> "A person riding in an automobile driven by another and remaining in it with knowledge that it was approaching a dangerous railroad crossing, without taking any precautions by way of warning the driver, or otherwise, is guilty of contributory negligence, and if you believe from the evidence in this case, under the instructions of the court, that the deceased was riding in an automobile driven by Moreth and remained therein knowing that said automobile was approaching a dangerous railroad crossing, having actual knowledge of said approach, or if by the exercise of ordinary care for his own safety the deceased should have had knowledge of said approach and, having such knowledge, took no precaution by way of warning the driver, then you must find the defendant not guilty."

In view of the fact that this instruction directs a verdict, we think it would have been error to have given it. The duty of one riding in an automobile under such circumstances may or may not be to warn the driver, according to the circumstances, and in each case the question of fact is for the jury. We think there was no reversible error in the giving or refusing of instructions.

It is next urged in defendant's behalf that the verdict is against the manifest weight of the evidence. The admitted speed at which the passenger train of the defendant company was moving, in view of the ordinance which is in evidence, made a <u>prima facie</u> case for the plaintiff. This contention is without merit.

IV. It is next urged that the deceased was guilty of contributory negligence because a preponderance of the evidence indicates that the occupants of the automobile did not look and listen before attempting to pass over the crossing. It has been often decided that, whether the parties are guilty of negligence under such circumstances is a question for the jury. <u>T. H. & I. R.R.</u> v.

Voelker, 129 Ill., 540; Gibbons v. A. N. & Co., supra; Henry v. C. C. C. & St. L. R. R., 236 Ill., 219; Rosenthal v. C. & A. R.R. Co., 255 Ill., 352; Winn v. C.C.C. & St. L. R.R.Co., 239 Ill., 132. These cases also establish the proposition that the deceased had a right to presume that defendant's trains would be run with proper care and not in violation of the rate of speed prohibited by the ordinance.

V. It is next contended that the court's instruction to find Moreth not guilty at the close of the plaintiff's evidence is of itself reversible error, and upon oral argument this was the principal point upon which the defendant relied. The defendant Railroad company did not object at the time this instruction was given, and did not preserve an exception to the action of the court. It is argued by the defendant that the instruction took from the consideration of the jury the questions whether Moreth was guilty of negligence, whether the negligence of Moreth was the sole cause of the injury, and whether the plaintiff himself was in the exercise of ordinary care for his own safety. We are of the opinion (considering the evidence) that if plaintiff had objected to the instruction directing a verdict as to Moreth, it would have been reversible error upon error assigned by him, but are unable to perceive what standing the defendant Railroad company, which made no objection at the time, has to assign error on this point. The defendant says that it has been unable to find any case which holds that, where the proof sustains the allegations of the declaration as to all the defendants, and there was a directed verdict as to one or more, that a declaration in such case containing joint counts would be sufficient to sustain a verdict and judgment. On this point they rely upon the dictum in the case of Pierson v. Lyon & Healy, 243 Ill., 370. That was a case in which an action was brought to recover damages for personal injury against Lyon & Healy and the City of Chicago. There was one count in the

declaration which charged that the City suffered and permitted a street to become and remain in a dangerous condition, and that Lyon & Healy negligently and carelessly drove an auto truck, and that as a result of their joint negligence, the plaintiff received injuries. A peremptory instruction was given to find the City not guilty, and such a verdict was returned, while by a separate verdict Lyon & Healy was found guilty and damages assessed. The Appellate court found that the proximate cause of the injury which plaintiff sustained was the backing of the truck, but Lyon & Healy argued that the proximate cause was the combined and concurrent negligence of both defendants and that the verdict of not guilty as to one of them was equivalent to a finding that the negligence charged in the declaration was not proved. The Supreme court held that the defect in the street was neither the proximate cause nor the concurrent cause of the injury.

The court said that there was no allegation that the defendant City and Lyon & Healy were jointly engaged in the performance of any act which caused the injury, and that, if there was proof tending to show that the carelessness of Lyon & Healy's servants operating the auto truck caused the injury, this was sufficient to sustain a recovery, notwithstanding the averment that the injury was also a result of the defect in the street; that this averment was essential to recovery against the City, but not essential to a recovery against Lyon & Healy.

The Court added: "If the proof had shown that the auto truck had run backwards by gravity on account of the hole in the street then there would have been force in appellant's contention; but the weight of the proof tends to show that this was not the case, but that the truck was run backwards by its driver. In such case, finding the City of Chicago not guilty did not require that appellant should be found not guilty also."

It is apparent, we think, that this remark of the court referred to a supposed case where joint defendants were engaged in a single negligent act. That is not the case here, and we think the dictum not applicable.

The defendant says that the verdict of the jury pursuant to instructions of the court finding Moreth not guilty was tantamount to a verdict that under the declaration the defendant was not guilty because the evidence at that time tended to establish that the accident was caused by the joint and concurrent negligence of both as laid in the declaration. Even if we could regard the question as preserved on the record, we cannot agree with the defendant's contention.

The instruction in favor of Moreth was given at the close of the plaintiff's evidence. The cause was submitted to the jury so far as defendant was concerned upon all the evidence. In other words, the court in directing the verdict in Moreth's favor passed only upon the sufficiency of evidence which was then before the jury. It might well have been that, while at the close of the plaintiff's evidence there was no evidence tending to show that Moreth was guilty, at the close of all the evidence there might have been possibly before the jury evidence indicating not only Moreth's guilt but also that of the defendant. If the defendant Railroad company thought that the instruction given inMoreth's behalf might, under the circumstances, mislead the jury, it could have protected itself by asking the court to give proper instructions upon that point. This it did not do. It therefore has no reason to complain. The questions of whether Moreth was guilty of negligence, whether the negligence of Moreth was the proximate and sole cause of the injury, or indeed whether the deceased was guilty of contributory negligence, were not in any sense removed from con-

sideration of the jury at the close of all the evidence, because the court (passing upon plaintiff's evidence only) conceived it to be its duty to instruct that Moreth was not guilty.

These views we think are consistent with the rules laid down by our Supreme Court in the case of Fowler v. Chicago Rys. Co., 235 Ill., 196, where the court said:

> "It, Chicago Railways Company, is liable for results from its own failure to keep the street in repair and not because the City of Chicago also failed in that respect. Plaintiff in error can derive no benefit from nor can it complain of the action of the trial court in directing the jury to find the City of Chicago not guilty."

We find no error in the record, and the judgment is affirmed.

AFFIRMED.

Johnston, J., concurs.
McSurely, P. J., dissents.

159 - 29248

# 236 I.A. 640

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| BURLINGTON BLANKET CO., Appellant, vs. GEORGE W. COOK and CITIZENS STATE BANK OF MELROSE PARK, Intervenor, Appellees. | APPEAL FROM SUPERIOR COURT OF COOK COUNTY. |

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The Burlington Blanket Company is a corporation organized under the laws of Wisconsin. It filed its bill of complaint against George W. Cook, a resident of the city of Chicago, praying an accounting concerning certain transactions, in particular a certain contract made between him and the complainant on or about August 15, 1918. The defendant answered, admitting the execution of the contract but denying other material facts.

The cause was referred to a master, and thereafter the Citizens State Bank of Melrose Park filed a petition in which it alleged that the defendant Cook had assigned to it any and all moneys due to him from the complainant, and prayed that any such money found due in the proceeding should be paid to it. This petition was verified by the affidavit of the president of the intervening bank, who stated in his affidavit that the petition was true in substance and in fact. This petition averred the indebtedness of Cook to the petitioner, the assignment, and further set up that Cook had been adjudged a bankrupt.

Thereafter the intervening bank filed a cross-bill, claiming to be the owner of Cook's claims by assignment. This cross-bill was not verified, and an order was thereafter entered striking it but allowing the bank to become a defendant and giving it leave to file an answer and a cross-bill, which it did, again setting up the facts as theretofore alleged.

The master reported, finding that the complainant was indebted to Cook in the sum of $9041.94; that Cook had assigned to the bank and that the bank was therefore entitled to recover that sum from the complainant. The cause was heard by the Chancellor, apparently upon objections filed to this report of the master, but complainant has filed an abstract in this court which fails to disclose what these exceptions were.

The brief of the complainant presents two points on account of which it is claimed the decree should be reversed. First, because, as it is claimed, the court erred in not permitting the complainant to dismiss its bill of complaint; and, in the second place, because the intervening petition and cross-bill were not dismissed on complainant's motion, for the reason that the same were not verified, and because there was no affidavit, as required by section 18 of the Practice Act.(See Illinois Revised Statutes, chap. 110, sec. 18). Complainant cites Lapman v. Grand Crossing Tack Co., 187 Ill. App. 247; Lapman v. Chgo. R. I. & P. Ry. Co., 195 Ill. App. 370-2; Ill. Midland Ry. Co. v. Farmers St. Bk., 200 Ill. App. 591; Fingado v. Wilson N. & E. Co., 205 Ill. App. 267; and Paterson v. Iris Theatre Co., 218 Ill. App. 416, as sustaining this last point. We think it sufficient to say to this that we do not understand compliance with said section 18 aforesaid is a condition precedent to a recovery in proceedings in chancery.

As to the first point urged, it was not error to refuse the complainant leave to dismiss its bill of complaint, since it appears that several suits at law theretofore brought by the respective parties had been discontinued, and a stipulation entered into by the parties, providing that all the controversies involved in these suits should be disposed of in this case. Moreover, it is elementary that a complainant may not dismiss his bill after a cross-bill has been filed. Fischheimer v. Kuyersmith, 258

Ill., 392. The complainant has, therefore, presented no points which would require a reversal of the decree.

The intervenor, however, by leave of this court filed cross-errors and in support of the same argues at length that several items of the report of the master and the findings of the decree as to these items are not sustained by the evidence. He requests that a decree be entered in this court in favor of the intervenor for the total sum of $17,701.69.

The record of this case is voluminous, the abstract meagre, and the complainant has not seen fit to make any reply to the brief and argument of the defendant and intervenor, in which these cross-errors are discussed at length.

It appears from the facts as found by the decree that the complainant, Burlington Blanket Company, was on August 15, 1918, engaged in the business of manufacturing horse covers and kindred articles for army purposes; that it at that time had entered into a contract with the Government of the United States whereby it agreed to manufacture a large supply of blankets; and that its agreement with the Government provided that the contract might not be assigned either in whole or in part, nor the interest of the manufacturer allowed to pass or let to any other person, nor should there be any sub-contracting, sub-manufacturing or indirect employment of any kind by the contractor.

The defendant George W. Cook was at that time the lessee and proprietor of certain premises in Chicago which were equipped with machinery and power adapted to such uses as complainant desired in the manufacture of these blankets. Cook was doing business under the names of George W. Cook & Company, and E.C. Cook & Son, and had theretofore manufactured similar articles by agreement with the complainant company.

On August 15th Cook and the Blanket company after

III., 2nd. The manufacturer has, therefore, attempted to raise which would involve a revenue at the outset.

The deficiency, however, has been of this sound fiscal area--which and is another of the same argument as towards that sev- eral items of the revenue of the nation that the finances of there- fore be to lower tax are not available in the estimate. The re- sources that accounts be without in this years in order at the be- tween the two field and of 1917,18,19.

The result of this kind of treatment, the internal security, and the application has not been its to take up only to the total are required at the national and internally. It also those non-recurring are diminished in length.

It appears from the Times is that of the Senior Lord the Admiralty, Publicity Parent Income, was so lapsed it, 1919, mission in the Cabinet is manufacturing have needs and statute utilizing the long-continuing this is at line the Minister line - matters with the Government of the Royal Navy Minister is agreed to investigate a that agency of Ministry and that the Government with the Government circulated that the matters not be considered either be their or in part, nor the Internal of the manufacturing interest is from of fact is the other power, has Ministry there in any other matters, communications or Internal measures of may kind by the Commissioner.

The Defendant Service T. Dock was on that time the Navy and production of certain problem in Chicago, which was mentioned with industry and their should in and have to have whatever duration in the manufacture of Navy vessels. Then the Naval business on the means of Dorman B. Dock & Company, and B. Dock & Son, and had Commissioner manufacturing vessels and the by arrangement of the Navy's Dock company.

On August 15th Dock and the Minister Commerce after

extended negotiations entered into a written contract in and whereby Cook demised and leased to the Blanket company these premises for a period of one year from August 15, 1918, at the agreed rental of $40,000 per annum, payable in twelve equal monthly instalments on the 15th day of each month of said term, the first payment to be made on the 15th day of September, 1918. This agreement further provided that the Blanket company should maintain the premises "in their present order and condition, and shall conform to the Municipal and State Sanitary laws, shall pay for any and all help employed by party of the first part in said premises during the term of this lease, except for janitor services, janitor services to be borne by said party of the first part."

This agreement further provided that Cook should heat the premises during the term of the lease at his own expense, and that the Blanket company might terminate the lease at any time during the term by giving a written notice thereof at least thirty days prior to the day of cancellation.

The agreement by its terms went into effect on August 15, 1918, although not in fact executed until a later date. It was terminated on October 16, 1918, by notice in writing given by the complainant Blanket company. The rent had not been paid according to the terms of the agreement and Cook levied a distress warrant therefor and filed suit in the Municipal court of Chicago. The Blanket company thereupon replevied the property in two suits, one brought in the Federal Court and another in the Municipal court, these being the suits that were subsequently, by agreement of the parties, dismissed after the filing of the bill of complaint in this action. Pending the proceedings Cook was adjudged a bankrupt.

After the execution of the agreement of August 15th and prior thereto, Cook, by agreement of the parties, acted as the superintendent of the plant. A bank account was opened in the name of the Blanket company, and that company contributed the sum of $14,000 to that account. Other funds belonging to Cook personally were deposited therein, and moneys expended were paid out by checks. George C. Rasch, the president of the complainant company, C. W. Rasch, its secretary and treasurer, George W. Cook, manager, and E. I. Klock, assistant manager, being duly authorized by the complainant company to sign checks. On October 17, 1918, the authority of Cook and E. I. Klock in this respect was cancelled.

Following the report of the master the decree finds in stating the account between the parties, that the complainant was entitled to total credits of $26,258.16, and defendant, by some of its cross-errors, seeks to question this finding. However, no objection or exception to the finding is abstracted, and upon looking to the record we find that objection was not made before the master nor exception taken before the chancellor on this point. Therefore we will not disturb this finding of the decree.

The decree, however, disallows a credit claimed by the defendant in the amount of $2,000 for salary, it being the contention of Cook that he was employed by complainant at a salary of $1,000 a month; that the agreement was verbal and separate and distinct from the written contract, by which it was provided that rent should be paid for the use of the premises at the rate of $40,000 a year. We have examined the evidence bearing on this point.

There is no dispute that Cook in fact rendered the services, and there is certainly nothing in the written contract to indicate that this item was covered by that agreement. Even

in the absence of any specific agreement, the law would imply a promise on the part of the complainant to pay a reasonable price for this service. It seems to have been the theory of the complainant that the amount to be paid for rent of the premises, as well as compensation for Cook's services, was included in the rent to be paid for the use of the premises. The testimony of complainant's president is to the effect that, at the time of this transaction, he suggested that a contract fixing Cook's salary at $1,000 a month should be drawn, but that Cook said he would not sign such a contract because he wanted to feel free, and that complainant could discharge him in five minutes if he did not give satisfaction. There is nothing in the lease of the premises to indicate that it was the intention of the parties thereto that the rent reserved should cover this salary. The services were performed (this is undisputed) and we think casts the burden of proving that it was the intention of the parties that Cook's compensation should be covered by the amount reserved for rent. The testimony offered in complainant's behalf does not, in our opinion, establish this fact.

In the preparation of the contract the respective parties were represented by their attorneys, and it would seem that if the intent had been, as complainant now contends, the evidence of it would have been preserved in some way. We think the court erred in confirming the report of the master as to this item.

Another item for which Cook claims credit amounts to $718.45, and was paid for installing certain plumbing on the premises. Although the evidence shows without dispute that this work was done during the time complainant had possession of the premises, the item was disallowed by the master upon the theory that Cook incurred this expense upon his own account, and that there was no agreement on the part of the Blanket company to

reimburse him. However, two checks for $316.45 and $200 respectively were drawn upon the account of the Burlington Blanket Company by N. I. Klock, the assistant manager, in part payment for this work while it was in progress. The City Health Inspector was demanding that this work should be done. The evidence shows that it was done with the knowledge of the officers of the complainant company, other than Cook. It is difficult to perceive on what theory Cook is not entitled to credit for the amount of these checks. The contract between the parties provided that the Blanket company should maintain the premises in their then order and condition, and should conform to the Municipal and State Sanitary laws. In order to conform to such laws this work was done, and we think the court erred in disallowing this item.

A third item upon which cross-error is assigned is that the court disallowed a claim of Cook in the sum of $4072.50 for the manufacture of 1357½ dozen of leggings at $3 a dozen. The master does not state in his report the reasons on account of which this claim was disallowed, and we find no discussion of it in complainant's brief. This claim was on account of transactions which preceded the making of the contract of August 15, 1913, while Cook personally was in possession of the leased premises. The record shows that during the proceedings a petition was filed by complainant in the Superior court, asking that it should be allowed to offer evidence showing that payment had been made for this item. That motion was denied. The manufacture and shipment of these goods is shown by the testimony of James K. Malcolm, complainant's auditor, and it would seem, in the absence of evidence tending to show payment, the item should have been allowed. It is elementary that the defense of payment is one which must be pleaded and proved, and it therefore appears that the finding of the decree in this respect is against the manifest weight of the evidence.

Another cross-error questions the disallowance by the master of two items of $500 and $500 respectively, for which Cook claims credit, on the theory that these payments were for attorney's fees, for which the complainant, Burlington Blanket Company, was liable. The master found that these checks were given for legal services rendered to George N. Cook personally and were therefore not chargeable against the complainant. The defendant does not point out evidence from which we are able to say that this finding of the master is against the weight of the evidence.

The defendant and intervener requests a restatement of the account by this court.

On this record we find that the complainant is entitled to a total credit of $26,258.16; that in addition to the total credit allowed by the decree to Cook of $33,300.10, he should be allowed the additional amounts of $2,000 and $718.43 as hereinbefore set forth, making a total credit of $38,018.53, and a balance due to him of $11,760.39.

As to the item of $4072.50 above set forth, we think the opportunity should be given to complainant to prove, if it can, that this item has been in fact paid. The cause will be remanded in order that the evidence may be taken upon that point.

In case the evidence should disclose that defendant Cook is entitled to credit for that item, it also should be allowed. If, on the contrary, the Chancellor finds from the evidence that Cook is not entitled to credit for that item, a decree in the sum of $11,760.39 should be entered in favor of the intervener. The decree is therefore reversed and the cause remanded with directions to proceed in conformity with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Johnston, J., concur.

242 - 29331

W. S. HOWELL,
Appellee,

vs.

ALBERT HERSELL and JACOB HERSELL,
copartners doing business as
HERSELL BROTHERS,
Appellants.

236 I.A. 641

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT:

The defendants, copartners, appeal from a judgment in favor of the plaintiff in the sum of $365 entered upon the finding of the court.

Plaintiff's statement of claim alleged that defendants were indebted to him in that amount on account of insurance policies which had been issued to the defendants through the plaintiff at the defendants' special instance and request. It alleged that plaintiff paid the premiums as set forth to various companies at defendants' special instance and request, but had not been reimbursed therefor by the defendants.

The statement included an itemized account, setting up in detail the different transactions with reference to this insurance from January 26, 1923, to March 7, 1923, giving the dates upon which the policies were issued, the names of the companies and the amounts of premiums paid; also the respective dates upon which the policies were cancelled with the amount of premiums returned on account of such cancellations. This account showed a balance of $365.92, - 92 cents more than the amount for which judgment was entered by the court.

The defendants appeared and filed an affidavit of merits in which they made a general denial that they were in-

debted to the plaintiff, denied that plaintiff bought insurance as their broker, denied that plaintiff paid the premiums as set forth in the statement of claim, and denied that they requested or asked the plaintiff to pay such premiums for their account.

As a matter of further defense they specifically alleged that it had been agreed by and between plaintiff and defendants that defendants should have a right to investigate the various companies whose policies plaintiff offered to sell to defendants, and that, if after a reasonable time the defendants were dissatisfied with such insurance companies or policies delivered to them by plaintiff, they would have a right to cancel the same without any liability attaching to them during the period of investigation, further that, in accordance with this agreement, the defendants cancelled the policies mentioned in the plaintiff's statement of claim, delivered by plaintiff to defendants as agent of the various companies.

As indicating their views of the trial defendants quote Dr. Samuel Johnson, who, expostulating against mutton which was furnished for his dinner, said: "All in all, it is as bad as bad can be," and an examination of the record in this case indicates that there is some justification for the adoption of this language. The trial was evidently conducted with celerity which should prove more than satisfactory to those who complain of "The Law's Delays."

The defendants first urge that the court admitted incompetent evidence and the examination of the record indicates this is true. However, the trial was before the court without a jury, and the admission of such evidence is not reversible error where there is competent evidence sufficient to sustain the finding of the court. It will be presumed in such cases that the court disregarded incompetent evidence.

While many points are stated and discussed in the brief

and argument, the controlling question, as we view it, is whether there was sufficient evidence to sustain the finding of the court. Where the court hears a case without a jury, the presumption is in favor of the finding, and it will be sustained unless manifestly and clearly against the weight of the evidence.

The evidence tended to show that the policies of insurance set up in the statement of claim were delivered to the defendants, and that they obtained the benefit of such insurance. There was also evidence from which the court could reasonably find that such policies had been retained such length of time as precluded their return without payment for the insurance premium earned up to the time of cancellation. There was also evidence tending to show that the various amounts set up in the statement of claim had been paid to the insurance companies, and evidence, we think, from which the court might conclude that there was an implied promise to repay the sums so advanced.

The specific policies were not introduced in evidence, and it is objected "that the list contained in plaintiff's statement of claim was nowhere identified in the proofs as a correct list of the policies if any which plaintiff claims he delivered to defendants, but that, even if so identified, that list was never put in evidence, and that it cannot constitute evidence merely as being part of plaintiff's pleadings." The affidavit of merits, however, does not raise this issue; on the contrary, it by implication admits the correctness of the detailed statement in that it is therein stated: "These defendants aver <u>that the policies mentioned in plaintiff's statement of claim delivered by plaintiff to defendants</u> as agent of said various insurance companies were cancelled by defendants and returned by them in accordance with the agreement made with plaintiff at the time policies were delivered to them." Indeed, the correctness of this detailed statement

seemed to have been assumed by the parties in the trial of the case, as, for instance, where the attorney for defendants in the cross-examination of the plaintiff says: "By looking at this list here, your statement of claim, can you tell me which of those policies were renewals and which were original orders?" As was said in the case of Frankel et al. v. Salzenstein, 198 Ill. App. 363, with reference to a similar statement of claim, "If defendant wished to question the correctness of this statement, he should have specifically done so in his affidavit of defense as required by the Municipal Court rules which are in the record or as provided by Rule 29, he could, upon notice, be excused by the court from specifically answering any particular allegation upon showing to the court that he could not answer it because he did not have the necessary knowledge as to the fact alleged or for other good cause." And in Madison v. Fortune Bros. Brewing Co., 163 Ill. App. 276, it was held that where an affidavit of merits did not put in issue either the execution or assignment of a lease sued on, it was unnecessary to prove either such execution or assignment. It is true that, in that case also, the rules of the Municipal Court were made a part of the record and that such rules are not a part of the record in the case which we are now considering. It is also the law, as the defendants contend, that an appellate tribunal may not take judicial notice of the rules of the Municipal Court. Danville Mfg. Co. v. Kennedy, 275 Ill. 478; Sixby v. Ry. Co., 260 id. 475. We think, however, that these last named cases are distinguishable from this one, in that it appears from many cases which are before this court that the Municipal Court of Chicago has adopted as one of its rules of practice the provisions of Section 55, chapter 110, of the Practice Act. The Municipal Court Act gives authority to the Municipal Court to make every section of chapter 110 applicable to the Practice, in that court, and the power to do so has been upheld by this

court in Hoch v. Dickinson, 152 Ill. App. 412.

We think that, since it appears from these and other cases that the judges of that court have so approved of section 55 in the absence of some affirmative showing to the contrary, this court may properly presume that this section of the statute is still applicable. Lubitz v. Chicago City Ry. Co., 198 Ill. App. 487. That section of the Statute requires (in any suit upon a contract, express or implied for the payment of money, where the plaintiff files with his declaration an affidavit showing the nature of his demand and the amount due) that the defendant must file with his plea an affidavit setting up the nature of his defense. Under the provisions of this section of the statute, we are disposed to hold that, if the defendants here desired to put in issue the correctness of the account set forth in the statement of claim, it was necessary that the affidavit of merits should make specific denial of the material facts therein, and that, failing to do so, these must stand admitted. In spite of numerous errors of the trial court with reference to the admission of the evidence, we have no doubt the defendants owe the amount for which the judgment was entered, and it will therefore be affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

285 - 29374

236 I.A. 641

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| BRUCE OSBORNE, Complainant and THE AMERICAN LAND AND SECURITY COMPANY, (Interpleader), Appellant, | APPEAL FROM SUPERIOR COURT, COOK COUNTY. |
| vs. | |
| JOHN L. WELLS, Appellee. | |

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

Bruce Osborne, who was the complainant below, alleged in his bill that on November 22, 1920, and on December 11, 1920, respectively, he executed and delivered to the defendant, John L. Wells, two certain collateral notes, one for the sum of $1,150, and the other for $2,000, payable to Wells on demand; that, the total consideration for these notes was the sum of $2,000; and that, as a collateral security, he pledged eight certain promissory notes, a schedule of which notes was attached to the bill of complaint.

His bill further charged that no demand had at any time been made upon him for the payment of these notes; that, on March 16, 1921, he tendered to the defendant Wells the sums due upon the said two notes with interest, and demanded the return of his notes, and the collateral pledged, which demand was refused by the defendant.

The defendant, Wells, answered, admitting the execution of the notes and the pledge of collateral substantially as charged.

However, he alleged that, in consideration of the execution and delivery of the first note, he gave to Osborne United States Liberty bonds of the par value of $1,000, together with $150 in cash, and that, as consideration for the

second note, he gave to Osborne United States Liberty bonds of the par value of $2,000. He averred that, on or about January 10, 1921, a demand was made for the payment of both notes and that the complainant refused and neglected to pay the same or any part thereof; further, that on or about January 15, 1921, pursuant to authority conferred by these collateral notes, he sold all the collateral for the sum of $2,000, crediting upon the first note the sum of $600, and upon the second note the sum of $1,400.

The answer specifically denied that either before January 19, A. D. 1921, or before January 15, 1921, the complainant or any one in his behalf tendered to defendant the sums of money due and owing under the terms and provisions of the principal collateral promissory notes, and denied that he, Wells, was then the owner or possessor of these notes.

Pending the litigation, the American Land and Security Company, a corporation organized, doing business under the laws of the State of Delaware, having an office, however, in Chicago, Illinois, was given leave to file a bill in the nature of a supplemental bill and did so, therein alleging that the facts as set up in the bill of complaint were true, and that all the right, title and interest of Osborne in and to the eight promissory notes constituting the subject matter of the suit had been assigned to it.

The supplemental bill prayed that, upon the payment to defendant of the sum which should be found due on account of the two loans (which payment, it was averred, the intervenor was ready and willing and offered to make) the defendant should be ordered to deliver up these eight notes pledged as collateral security, and that the defendant might be enjoined from selling or transferring or otherwise disposing of the same; that, in

the event defendant should refuse to deliver up the notes or in the event that it should appear that he had disposed of any of them, a money decree for the face value of such notes with accrued interest should be entered against the defendant and in favor of the intervenor.

At the time of this intervention, the cause had been referred to a master in chancery who took the evidence and reported. The master in this report finds from a preponderance of the evidence that $2,000 was all the money received by Osborne from Wells, $1,000 at the time of the execution of the first note, and $1,000 at the time of the execution of the second note; that no other money was ever paid by Wells to Osborne in consideration of the notes; that these collateral notes were the property of the American Land and Security Company; that, on the 15th day of March, 1921, the defendant Wells was informed by one of the officers of the American Land and Security Company that the notes held by him as collateral were the property of that company, and the company then tendered to the defendant Wells a sum in excess of $3,000, in currency in payment of the amount due on the Osborne notes, at the same time demanding the return of all the notes held by Wells as collateral; that the tender was refused and the demand denied.

The master further found that, prior to the 15th day of March, 1921, no demand had been made by Wells on Bruce Osborne or any one for the payment of the Osborne notes; that an alleged sale of this collateral by Wells was made to one Fosick, who shortly theretofore had been a partner of Wells in a printing business; that this sale was a pretended one and was not bona fide; that the money paid by Fosick to Wells was really furnished by Wells; and that the sale was therefore void.

The master also found that a further alleged sale to

one C. E. Ivey, a brother-in-law of the defendant Wells and resident of Canada, was also only pretended and not bona fide, and that the money paid therefor was furnished by Wells; that the American Land Security Company was the legal owner of these collateral notes, which were of the face value of $10,150.33, and that a proper and sufficient tender had been made to Wells of more than the amount due to him on account of these collateral notes. The master therefore recommended that said collateral notes should be turned over by Wells to the American Land and Security Company upon the payment by said company of the sum of $2,000, together with interest; and that, upon the failure of said John L. Wells so to do, he should be ordered to pay the face value of such of these notes as he should fail to turn over and deliver, less the sum of $2,000 and interest advanced by Wells to Osborne; and that defendant Wells should also turn over the two collateral notes signed by Osborne; and that, upon his failure to do so, the collection of the notes should be perpetually enjoined. Objections were filed by defendant Wells which were overruled, and by order of the court stood as exceptions.

Upon the hearing of these exceptions, the court sustained the same and entered a decree finding as facts that the consideration for one of the notes given by Osborne to Wells was the sum of $1,150, being $1,000 in United States Liberty bonds of the par value of $1,000, together with $150 in cash and that for the other note Bruce Osborne received from Wells, the sum of $2,000 in United States Liberty bonds of the par value of $2,000. Also, contrary to the master, the court found that, on or about the 10th day of January, 1921, the defendant Wells demanded payment of Bruce Osborne on the two promissory notes. Further, that on or about the 15th day of January, Wells, pursuant to the terms of such promissory notes, sold the secured notes mentioned in such

promissory notes to Claude M. Fasick, for the sum of $8,000; that Fasick thereupon became and was the owner of these notes; that the American Loans and Security Company and Osborne had failed to prove the material allegations alleged in the bill of complaint and intervening petition; that the equities were with Wells. It was therefore ordered and adjudged that the bill of complaint and intervening petition should be dismissed with costs to the defendant to be taxed against the complainant.

The assignments of error argued in this court question the rulings of the court upon these exceptions, and the issues presented for our consideration are issues of fact. We do not deem it necessary to discuss at length the question as to the weight which should be given to the master's report. The rule to be followed in such cases has been laid down in Spencer v. Sudek, 168 Ill. 494. The finding of a master does not have the same weight as the verdict of a jury in a case at law; it is advisory and only prima facie correct; nevertheless, where the master sees and hears the witnesses, he has an advantage which neither the chancellor nor an appellate tribunal can have, in so far as weighing of the evidence is concerned. In determining the ultimate question here as to whether the finding of the chancellor is clearly and manifestly against the weight of the evidence, this court has a right to and should take into consideration the fact that the master who saw and heard the witnesses reached a different conclusion.

We have gone over the record with considerable care, and, as to one material point - namely, whether there was a bona fide sale of this collateral by the defendant Wells - we do not entertain a doubt that the conclusion of the master is correct and that the finding of the court is wrong. The sale of collateral amounting to over $10,000 face value and presumably good for a consideration of $2,000 is in itself a strong in-

dication that the transaction was only colorable. Moreover, it is claimed to have been made to one who would be most unlikely to invest in property of this kind, and to one who, up to a few months before the time of the alleged transaction, stood in a confidential relationship to the defendant, Wells.

The evidence also tends to show that the consideration for this supposed sale was furnished by Wells. That is a fair inference from the deposits made in their different accounts at or about the time of the supposed sale which neither Mr. Fasick nor defendant, Wells, was able to satisfactorily explain. Moreover, the uncontradicted evidence shows with respect to the alleged transfer to Mr. Ivey that defendant Wells was offered on March 15th the sum of $3,500 for the return of these notes; notwithstanding, we are asked to believe that a few days thereafter he sold the same notes to a relative in Canada for the sum of $2,100. Reasonable men do not thus act, and this testimony of defendant and Fasick on this material and crucial point in the case compels us to discredit their entire testimony. This alleged sale bears the earmarks of fraud. It was without notice and for an inadequate consideration and under these circumstances the burden of proof was upon Wells to show that he exercised the utmost fairness and good faith.

The evidence does not show that, but, on the contrary shows a further attempt on his part (after the offer to pay in cash the utmost that he could rightfully demand) to transfer this collateral outside the jurisdiction of the courts of this State and of the United States. We think the finding of the Chancellor is clearly and manifestly against the weight of the evidence, and the decree will therefore be reversed and the cause remanded with directions to enter a decree in accordance with the findings of the master's report.

REVERSED AND REMANDED WITH DIRECTIONS.

McAuley, P. J., and Johnston, J., concur.

294 - 29383

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| H. V. GOODMAN, Appellee, vs. GENERAL MOTOR UNDERWRITERS, a Reciprocal Insurance Exchange, Appellant. | 236 I.A. 641<br>APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in favor of the plaintiff in the sum of $698 entered upon the verdict of a jury after a remittitur in the sum of $10 had been entered, and motions for a new trial and in arrest of judgment overruled.

The plaintiff's suit was upon an insurance policy issued by defendant, by the terms of which defendant agreed to indemnify the plaintiff against all direct loss or damage in excess of $50 which might be caused solely by accidental collision to the body, machinery and equipment of a certain Chandler automobile.

It is not disputed that such collision occurred upon the fourth day of October, 1931, but the defendant contends that the plaintiff, upon the undisputed evidence, cannot recover for the reason that certain warranties by the plaintiff contained in his application for insurance and in the policy itself are untrue, and because the plaintiff (as it is claimed) made certain false statements to the defendant immediately after the accident. It is also urged that the trial court erred in denying the motion of the defendant to strike out the testimony of a witness, one Sparrow, who testified to certain matters material as to the amount of damages sustained.

First: The policy provided that the entire contract should be void unless otherwise provided by agreement in writing added thereto, if the interest of the subscriber in the

purchased the automobile and from the time he obtained the policy of insurance, rented or leased it to one Arthur L. Monahan, and that defendant urges that for this reason also the plaintiff can not recover. Upon this point the testimony of the plaintiff is to the effect that Monahan was a real estate agent working upon a commission, and that he, the plaintiff, made an arrangement with him whereby he drove Monahan and prospective purchasers to inspect property offered for sale; and that in consideration of this service he received a commission of two per cent. It also appeared from plaintiff's testimony that McIntosh & Company, real estate dealers, for whom Monahan acted as agent, increased Monahan's commissions from eight to ten per cent in order that Monahan could afford to give the two per cent to a driver who would drive him around in an automobile. This evidence, however, we think falls far short of establishing the fact that the automobile was either leased or rented to Monahan, since the evidence indicates that plaintiff himself at all times drove the car and retained the possession and control of it. This point, also, we must therefore hold is not well taken.

In the third place the insurance policy provided that the entire contract should be void if the subscriber concealed or misrepresented any material fact or circumstance concerning the insurance, or in case of any fraud, attempted fraud or false swearing by the subscriber touching any matter relating to this insurance or the subject thereof, whether before or after loss. The defendant contends that the plaintiff made false statements to it after the accident and concerning the loss, and that because of these false statements he is precluded from recovering. It appeared that after the accident the plaintiff made three different statements to the defendant with reference to the loss and the circumstances under which it occurred. It seems that at the

time of the accident plaintiff and Monahan were accompanied by two ladies. Plaintiff stated to the defendant's attorneys that these ladies were prospective buyers of real estate, and this he admits was untrue. It appears, however, that after making this statement he informed the defendant as to the true situation and the reasons which led him to prevaricate. However this may be, it is also uncontradicted in the evidence that after knowledge of the facts the defendant company accepted from him payment of a premium due on the policy, which, up to that time, had not been paid. We think the receipt of the premium with knowledge amounted to a waiver of the conditions and warranties of the policy. Northwestern Mutual Life Insurance Company v. Amerman, 119 Ill. 329; Commercial Insurance Company v. Spankneble, 52 Ill., 53; Reaper City Insurance Company v. Jones, 62 Ill., 458; Lycoming Insurance Company v. Barringer, 73 Ill. 230; Farmers and Mechanics Life Association Company v. Caine, 224 Ill., 599. It appears, therefore, that this third contention of defendant cannot be sustained.

In the fourth place, the defendant contends that the court erred in denying a motion of defendant to strike out the testimony of a witness for the plaintiff, one Sparrow, who testified as to the condition of the automobile and the repairs which were made upon it. Much of his testimony was received without objection, and the motion of the defendant to exclude all of it came at the conclusion of the evidence. Even if it is conceded that a part of the testimony was incompetent, this motion came too late and was properly denied.

There is no reversible error in the record and the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

236 - 29375

CHARLES B. THEBCOTT,
Appellee,

vs.

STANFORD WHITE,
Appellant.

236 I.A. 641

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

The defendant seeks to reverse a judgment against him for $3000, the amount found by a jury to be due the plaintiff for unpaid royalties.

Plaintiff was the owner of certain patents upon steam cooking apparatus and processes of cooking meats at low temperature. By a written contract, dated December 31, 1919, he granted to the defendant the exclusive right within the United States to use his patented processes and to manufacture and sell the machines and apparatus described in such patents during the full term of the patents, and defendant agreed to pay to plaintiff certain specified royalties. After stating the percentage rates of such royalties, the contract provides that defendant shall pay to the plaintiff the sum of $6000 a year, "as a minimum royalty," in equal monthly installments during the first year and in quarter-yearly installments thereafter; that "accountings shall be rendered" monthly during 1920 and quarterly thereafter; that if defendant should fail to "render such accountings" or to make payment of royalties as therein provided, plaintiff may terminate "this license" by giving written notice of his election so to do; and that defendant may at any time terminate "this agreement" by giving thirty days' written notice and making payment of all

royalties due. The tenth clause of the contract provides that the "license herein granted may be assigned" by the defendant to a corporation which he "shall cause to be formed," and upon acceptance of such assignment by such corporation, the rights granted to defendant "shall inure to such corporation," and the obligations "herein undertaken" by defendant shall be binding upon such corporation.

It appears from the evidence that at the time this contract was made, defendant was engaged in the manufacture of textile fabrics and that he expected two friends of his, who had seen the patented "cookers," or "ovens" (as they were called) in operation and were favorably impressed, to get an order from one of the Chicago packing houses for sixty or more of them; but for some reason the expected order was not obtained and nothing was done under the contract until September, 1920. Then one of these friends of the defendant succeeded in interesting the Superior Oven Company, and a contract, dated September 17, 1920, was entered into between defendant and that company, giving the latter a sublicense for the life of the patents to manufacture and sell the patented apparatus for the use only of hotels and restaurants. Defendant then paid plaintiff $3333.28 as the proportion of the first year's minimum royalty which had accrued up to that time. Some question having been raised as to the right of defendant to grant such sublicenses, plaintiff, at defendant's request, executed another contract, dated November 22, 1920, authorizing that to be done, and ratifying the Superior Oven Company contract.

In April, 1921, defendant formed a corporation, called The Trescott Company, with a capital stock of $26,000, of which defendant subscribed for all but two shares. His attorney and one of his employes subscribed for one share each. These three constituted the board of directors. Defendant assigned to each

of the others one undivided two-hundred-sixtieth part of the three contracts above described, and each of the three then conveyed all his interest in such contracts to The Trescott Company; and the statement of the incorporation of that company recites that the capital stock of $26,000 was fully paid in property consisting of said three contracts, "appraised" at $26,000.

The sub-license contract with the Superior Oven Company contemplated the manufacture of at least 100 ovens during the first year, upon which, if manufactured and sold, royalties amounting to $5250 would accrue to defendant. Defendant testified that when he made the payment above mentioned to the plaintiff, the latter agreed to wait for the payment of further royalties until the Oven company made its royalty payments to defendant. While plaintiff denies this, it appears that no further payments were in fact made for about a year thereafter. During that time, the Superior Oven Company manufactured a number of the patented cookers, but did not succeed in disposing of the same, and did not pay any royalties. In November, 1921, defendant brought suit, in his own name, against that company to recover $5250 royalties and that suit was still pending when this suit was tried. Three days after the first amended plea and affidavit of merits were filed in the present case, The Trescott Company was substituted as plaintiff in the suit against the Superior Oven Company.

In September or October, 1921, The Trescott Company began making payments to the plaintiff at the rate of about $300 a month, apparently on account of royalties on the sale of "ham cookers." Defendant testifies that at the end of that year, he called the plaintiff into The Trescott Company's office and showed him a statement of the royalties then due amounting to $8766.72 and said that if plaintiff insisted, that amount would

be paid him, in which case, however, the company would terminate the contract and discontinue the manufacture of cookers, but if plaintiff would agree to wait for $8000 of that amount until the royalties due from the Superior Oven Company should be collected, matters would go on as before; that plaintiff demurred at first, but finally consented, whereupon a check for $766.72 was given him. Defendant's testimony in this respect is corroborated by his bookkeeper. Plaintiff testified that he made no such agreement, but that he said he "would like the whole of it, but that if it was inconvenient he would take the $766.72 and let the other run for a few weeks."

In March, 1922, the plaintiff signed a written agreement prepared by the defendant's attorneys by which the plaintiff agreed with The Trescott Company to reduce certain royalties mentioned in the original contract. This was signed on behalf of The Trescott Company, by the defendant as its president. On October 14, 1922, The Trescott Company, by the defendant as its president, served a written notice upon the plaintiff "cancelling the agreement" of December 31, 1919. In November, 1922, this suit was brought.

It is first contended that by the incorporation of The Trescott Company and the assignment to that corporation of the contracts above mentioned, followed by the collection of royalties from that corporation by the plaintiff, defendant was released and discharged from all liability. It is insisted that thereby a new contract was made, by which the corporation assumed defendant's liability for the payment of royalties, and defendant was released from such liability. In support of this theory, defendant's counsel maintain that the tenth paragraph of the original contract provides for "a substitution of parties and a discharge of the defendant from liability thereunder." The tenth paragraph provides that the contract may be assigned to a corporation which

By just this, in which case, however, the manager would lose the protection of statutes for violations of duties, but it probably would suffer to call for proof of this account with the regulations for from the required that company should be multiple, matters would go to be before the Liability Company v. Lively, but finally overturned, decreased a delay the 1911.77 was also also. Liability's availability in this support is overturned by the business. Plaintiff business does be made to such company that but to not be "small like the check of it, but this if it was discontinued to small like the 1911.77 in, but the other for a fire years."

In June, 1910, the plaintiff opened a million commission prepared by the defendants otherwise to which the plaintiff agreed that the present company to issue actual regulations conditions in the related business. This was right on behalf of the Insurance Company, or for related in its problem. In January 24, 1911, the insurance business, by its defendant in its problem, sent a million matter upon the Liability Publishing the agency agent or company in. Jan. In February, 1911, this act was invalid.

It is also undoubted fact by the liability of the Insurance company was the assignment to this publication of the state issue business, claimed by the difference of regulation from such organization by the plaintiff, contained the problem was claimed from all liability. It is indeed not clearly a new business for such, in order the publication company's liability for the general of regulation, but defendant was release from such liability. In consist of the company, defendant's company actually that the state publication or the business problem from a business for publication or the business from liability by defendant." The state contention argues that the company had to business to a commission which

shall be formed by the defendant, but it does not provide that such assignment and the acceptance thereof by such corporation shall end the defendant's liability for the payment of the specified royalties. It states that upon the acceptance of such assignment by the corporation, the rights granted to defendant "shall inure to such corporation," and the obligations of defendant shall be binding on the corporation. But mere "assumption of liability is not novation." (Illinois C. & E. Co. v. Linstroth Wagon Co., (C.C.A.) 112 Fed. 737, 740.) To have that effect, it must also appear that the creditor (in this case the plaintiff) assented thereto "in some way which amounted to an agreement to accept the corporation as alone liable" for defendant's obligations under the terms of the contract. (Walker v. Wood, 170 Ill. 463, 467.) Such assent or agreement may be either express or implied, but neither knowledge of the assignment, nor the acceptance of partial payments of the stipulated royalties, nor both combined, would necessarily establish such assent and agreement as a legal conclusion. (Ibid. 467.) In every case of alleged novation, the question to be determined is, "did the parties intend by their arrangement to extinguish the old debt or obligation and rely entirely on the new, or did they intend to keep the old alive and merely accept the new as further security." (20 R. C. L. 366; Illinois C. & E. Co. v. Linstroth Wagon Co., supra.) This question was properly submitted to the jury as a question of fact, in and by the defendant's fourth and fifth instructions, and the jury found against defendant's theory of the facts.

It is said, however, that the contracts in question granted to the defendant a personal, exclusive license, and contemplated personal effort on the part of the defendant. Assuming this to be true, it does not follow that the assignment to the corporation necessarily released the defendant. It was a circumstance to be considered with other facts and circumstances in determining whether both parties intended thereby to extinguish

the individual obligation of defendant to pay royalties and rely entirely on the assumption of that obligation by The Trescott Company. Standing alone, it would have little weight as evidence, and when considered with other pertinent facts, it ceases to have any weight whatever. To all practical intents and purposes, matters went on after the assignment precisely as before. In the same manner as before the assignment, defendant thereafter "used his best endeavors to promote the use of said inventions and create a demand for said machines," as the contract required. When the Superior Oven Company failed to pay its agreed royalties, defendant brought suit, in his own name, against it. He also assumed the right, in his own name, to cancel the Oven Company's contract because of its failure to pay royalties. We think the evidence, considered together, fails to show that the plaintiff intended to release defendant from his express promise to pay the minimum royalties while the contract was in force and accept, in lieu thereof, the promise of The Trescott Company.

It is next insisted that the contract contains no positive obligation on the part of the defendant to pay royalties, and the case of Moon v. Roberts, 186 Ill. App. 18, is cited in support of this contention. The court held, in that case, that in the contract there under consideration there was no absolute undertaking to pay minimum royalties, but that under the peculiar language of the contract a minimum amount to be paid was inserted for the benefit of the patentee, to enable him to terminate the contract in case the expected income from royalties did not amount to the sum so mentioned. In this case, however, the fifth paragraph of the contract expressly provides that defendant "agrees to pay" the sum of $5000 per year "as a minimum royalty," payable in stipulated installments. There is no condition attached to this express agreement of the defendant, and the subsequent acts of the parties show that both fully understood that defendant was thereby obligated to pay

at least $5000 per year to the plaintiff as royalties, whether anything was done under the contract by the defendant or not.

From what we have said, it will appear that we are of the opinion that the verdict is not manifestly contrary to the weight of the evidence, as is contended. While the verdict is much less than the amount claimed, plaintiff does not, and defendant can not, assign error on that account.

Other minor contentions are made by defendant's counsel, all of which we have considered, and are of the opinion that no reversible error is shown.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

19 - 29414

236 I.A. 642

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MRS. J. C. CORBINS,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE FITCH
DELIVERED THE OPINION OF THE COURT.

The defendant was found guilty of a violation of the statute of this state regarding the registration of real estate brokers, and was fined. She prosecutes this writ of error. No brief has been filed by the state's attorney.

The information charges, in substance, that on certain specified dates, at the city of Chicago, defendant advertised and assumed to act and acted as a real estate broker without having a certificate of registration issued by the Department of Registration and Education. The statute (section 1, chap. 17a, Cahill's Statutes) makes it "unlawful for any person to act as a real estate broker," or "to advertise or assume to act as such," without such a certificate. This prohibition is followed, in the same paragraph, by the proviso "that nothing in this act contained shall prohibit the co-operation of, or a division of commissions between, a duly registered broker of this state and a non-resident broker having no office in this state."

It is contended that since this proviso is "in the enacting clause of the statute," and exempts a non-resident broker, under the circumstances stated, from the operation of the statute, therefore it was necessary that the averments of

the information should negative the exception mentioned in the proviso. In support of this contention, defendant's counsel relies mainly on the case of Beasley v. The People, 89 Ill. 571, 577. That case is cited in the later cases of Sokol v. The People, 212 Ill. 338, and The People v. Butler, 268 Ill. 635, wherein it was held that it is unnecessary, in an indictment, to negative a proviso which is not descriptive of the offense, even though such proviso is in the same paragraph or sentence as the enacting clause of the statute.

In the Sokol case, supra, it was held to be unnecessary in an indictment for bigamy, to negative the exceptions enumerated by the statute, though contained in the same section as the enacting clause, because the proviso containing such exceptions was not "descriptive of the crime." The Butler case, supra, applied the same principle to the section of the Criminal Code regarding indecent liberties with children. In The People v. Krause, 291 Ill. 64, it was held that it was not necessary, in an information charging the defendant with a violation of the Medical Practice Act, to negative the exceptions therein mentioned.

The question to be determined here does not depend merely upon the position of the proviso in the statute, as contended by counsel. The determinative test is whether the proviso is descriptive of the offense; for if the description is complete without the proviso, then the latter is a mere matter of defense and need not be negatived. (U. S. v. Cook, 17 Wall. 168, 173.) Applying this test to the statute under consideration we think it must be held that the description of the offense contained in the first part, or sentence, or section 1 of the Act in question is complete without the proviso, and therefore, as was said of a like proviso in the Sokol case, supra, "the proviso following, with its exceptions,

is not in any manner descriptive of the crime." It follows that it was not necessary to negative the proviso in the information. If defendant's acts came within the proviso, that was a matter of defense.

It is next insisted that the judgment is erroneous because the record does not show that defendant waived a jury trial. The judgment states that "the people being now here represented by the state's attorney, and said defendant being present in his own person as well as represented by counsel, the trial of this cause is now here entered upon before the court without a jury, and the court, after hearing all the testimony of the witnesses and the arguments of counsel, and being fully advised in the premises, renders the following finding," etc. The record does not state, in terms, that all this was done by agreement or by consent of the defendant. There is no bill of exceptions or stenographic report or statement of facts in the record.

In the early case of Burgwin v. Babcock, 11 Ill. 28, it was held, in an action of debt, that where the record shows that the cause was tried by the court, in the presence of the parties, "it is a fair inference that the cause was heard by the court by their consent," for if the fact were otherwise, "defendants would have objected * * * and tendered a bill of exceptions," and "if they were present and interposed no objections, they waived their right * * * and acquiesced in the trial by the court." The principle so announced has been followed and applied in Henrichsen v. Hudd, 53 Ill. 477, 480; Phillips v. Hood, 88 Ill. 450, 451; Chicago, Santa Fe & Cal. Ry. Co. v. Ward, 128 Ill. 349, 355; Miller v. The People, 156 Ill. 113, 114; Sanitary Dist. v. Bernstein, 175 Ill. 215, 219, and Baumann v. Baumann, 223 Ill. App. 285.

It is true that all these are civil cases, in which it is always allowable for the parties to waive a jury and submit their case, or any part of it, to the court for decision. (Hunter v. Empire State Surety Co., 261 Ill. 335, 338.) The offense charged in the information in this case is a misdemeanor and it was tried as such in the Municipal Court. Where the offense charged is a misdemeanor, the right to a jury trial may be waived as in civil actions. (Brewster v. The People, 183 Ill. 143, 153; Jacobs v. The People, 218 Ill. 600; Sturges & Burn Manf. Co. v. Beidel, 301 Ill. 253.)

The judgment is affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

48 - 29449

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

CLARENCE THOMAS,
Plaintiff in Error.

236 I.A. 642

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE FINCH

DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review an order and judgment of the Municipal Court finding the defendant guilty of neglecting and refusing to maintain and provide for his wife, and directing him to pay to the clerk of the court for her use the sum of $15 a week.

The case was tried before the court without a jury. There were but two witnesses, the husband and the wife. Both are young people and were married in June, 1932. They separated in June, 1933, and each claims the other is at fault. After the marriage, they went to live in an apartment on the first floor of a building owned by defendant's parents.

It appears that defendant earned $50 a week at some occupation not shown by the evidence, and that in the evenings he attended night school at the Lewis Institute, studying mechanical engineering. He testified that he turned over his salary to his wife every week, and it appears that after the separation, he paid her $30 a week up to about twenty days before his arrest in February, 1934. This is not disputed. There are no children.

She testified that she quarreled with him "on account of his mother," who, she said, "always made a liar

out of me and ran me down to others," and that on June 13, 1923, defendant told her that his mother "wanted the flat," that "he was through with married life," and that she "had to get out;" that the same evening he took her to her mother's and left her there; and that she returned on the second night and slept in their flat "two nights alone while he slept upstairs with his folks." After that, she lived with her mother, a widow, on the $20 a week her husband paid her. He testified that he was in the habit of taking her to her mother's house when he went to night school and that on the night of the separation he went home as usual after school and found her gone; that he stayed in their flat that night and she did not return, nor did she telephone; that after that he slept upstairs. She also testified that for two weeks in November, 1923, she secured employment "because," she said, "I had to have some clothes;" that except for that time, she had no employment during the six or eight months following the separation, because, she said, she "had been a nervous wreck ever since it happened," and that when she had her husband arrested, she had not "a cent to her name," nor "any clothes for the summer." This is the only evidence that she was "in destitute and necessitous circumstances," as charged in the information. When Mrs. Thomas was asked whether she would be willing to live with her husband again, she emphatically replied that she would not. On the other hand, the defendant said that if she came back, he had a home for her, in the down-stairs flat, and was prepared to support her there.

We are of the opinion that the evidence wholly fails to sustain the finding and judgment. It is clear that these two young people have quarreled and are separated, and that for a short while before his arrest, he did not pay her any money. But that he neglected or refused to provide for her support

without reasonable cause, was not shown by the evidence. The burden of proof is upon the People to establish the offense charged beyond a reasonable doubt, and that burden was not sustained. The statute was not intended to be used as a substitute for civil proceedings for separate maintenance or divorce, in which alimony may be allowed in proper cases.

The judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes and Gridley, JJ., concur.

34 - 28326

236 I.A. 642

ROOS MANUFACTURING CO.,
(a corp.),
Defendant in Error,

vs.

EDWARD ROOS, EDWARD ROOS & CO.,
a corporation, and ED. ROOS COMPANY,
of FOREST PARK, a corporation,
Plaintiffs in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree entered July 13, 1922, granting an injunction pursuant to the recommendation and report of a master in chancery to whom the cause had been referred, and pursuant to the prayer of the bill of complaint as amended.

The bill was predicated on charges of unfair competition, and the injunction restrains and enjoins plaintiffs in error companies, their officers, etc., from using or permitting the use in connection with their business or products certain trade marks and trade names and certain expressions containing the word "Roos," and "the word 'Roos' alone or as part of any expression or description of the business or products of said defendants Ed. Roos Company of Forest Park, unless in the same expression or description it be clearly and distinctly stated or made clear that such business or product is not the business or product of the complainant company," and they are also restrained from representing in any manner whatsoever that the products of the defendants, or any of them, are the products manufactured or sold by the complainant company.

The facts and questions in this case are so similar to those

involved in The Nester Johnson Mfg. Co. v. The Alfred Johnson Skate Co., 313 Ill. 106, that we have held consideration of this case open until the decision in the latter case was made.

Each case presents a state of facts where a family name had ceased to be only the name of the manufacturer, and had gained a secondary meaning describing and indicating the particular line of goods manufactured by the complainant, and there is a striking parallelism in the facts of the two cases. In each case after the family name had acquired such secondary meaning another member of the family, claiming the right to use his own name, organized a company and gave it his name for the purpose of manufacturing the same line of goods with which the family name had become identified.

The record presents the same questions as were presented for determination in the Johnson case, namely, whether the name had acquired such secondary meaning, and whether the defendant companies' use of the name, especially the Ed.Ross Company of Forest Park, the only one continuing the use of it, and their methods of business were of such a character as to induce purchasers from it to believe they were buying the complainant's goods.

The evidence is voluminous and it is impracticable to discuss it in detail. Reference will be made to the most important facts the evidence strongly tends to establish.

It appears therefrom that complainant company was incorporated in 1889 as the Ed.Ross Manufacturing Co., and changed its name to The Ross Manufacturing Co. in 1897; that it succeeded to a business established by Edward Ross, Sr., in the year 1871, which had been carried on by him individually under the names successively of Ed. Ross, and Ed.Ross & Co., until the incorporation of complainant; that said Ed.Ross was the father of Otto A. Ross, the president of complainant company, and of defendant Edward Ross

the president of defendant Ed. Rees Company of Forest Park; that prior to 1900, the principal business conducted under such names was the manufacture and sale of curtain poles and wooden novelties, with which the name "Rees" became well and favorably known among the furniture trade in this country; that about the year 1906 complainant began the manufacture and sale of cedar chests, which a year or so later became and continued to be its principal business; that in 1907 Edward Rees, Sr. died, and at that time the elder son, Otto, was president and the younger son, Edward, secretary of complainant company, both of whom had been brought up in the business, and were stockholders of complainant company and in its employ prior thereto; that in 1906 Edward sold his stock, went to Kentucky and organized there a corporation under the name of the Columbia Mfg. Co., for the manufacture and sale of articles similar to those manufactured by complainant, and after the death of his father changed the name of said company to "Ed. Rees Company." The plant of said concern having been destroyed by fire in January, 1910, Edward went into the employ of other concerns in New York city which manufactured similar articles, until 1915, when he again entered the employ of plaintiff company upon a salary and became its vice president. As a result of disagreements he was discharged by complainant in February, 1916. After his discharge he organized in that year a corporation under the name of Edward Rees & Co., for the purpose of manufacturing and selling cedar chests and other wood novelties, with its principal place of business in Chicago. The company discontinued active business in 1919, and in July of that year Edward Rees promoted and caused to be incorporated the defendant corporation, Ed. Rees Company of Forest Park, with its principal place of business in Forest Park, a suburb of Chicago, for the purpose of manufacturing and selling cedar chests, of which Edward Rees has been the president and

manager since its organization. Its capital stock has been increased from $100,000 to $400,000, and in 1920, the year this bill was filed, it had a total business of approximately half a million dollars in cedar chests. The advertising expenditures of the two defendant companies for the years 1916 to February, 1921, inclusive, amounted to a little over $14,000, whereas complainant expended in the same period for advertising, exhibition, catalogs, cuts and photos a little over $54,000, and its gross business for 1919 aggregated about $500,000, 85 per cent of which consisted of cedar chests and utility boxes. Complainant employed a large number of traveling salesmen and had distributing agents in many of the States, several of whom were induced to enter the employ of the Ed. Roos Company of Forest Park. It being the only one of defendants companies continuing to do business it will hereinafter be referred to as defendant company.

After engaging in the manufacture and sale of cedar chests complainant adopted a trade mark and its cedar chests became known thereby and also under the descriptions of "Roos" and "Roos Line" and "Roos Red Cedar Chests" and "Roos-ter Line" and similar descriptions. Complainant's trade mark, registered in October, 1915, pictured a rooster on the top of a globe across which was printed in heavy black type the word "Roos." These trade marks were printed in complainant's catalogs and circulars which were distributed to customers and the trade generally. The evidence shows that one of defendant company's predecessors also adopted a device with a globe on its letter heads, and that photographs of cedar chests and utility boxes sent out by complainant and defendant company were almost identical, and the articles represented were the same in general style and design.

The evidence also shows that complainant received orders, remittances, letters, etc., by mail which were intended for de-

fendant company, and others were sent to the latter that were intended for the former. These letters were variously addressed, some to "Roos Mfg. Co." or merely "Roos Co.," to Chicago merely, or to defendant company's business address, or complainants address, and some addressed to complainant company enclosed orders for defendant company.

There was much evidence tending to show that complainant's products were known to the trade as the "Roos Line," and that salesmen for defendant company, some of whom had been previously employed by complainant, made use of the terms "Roos" and "Roos Line" in selling their products, and that through the use of such and similar expressions customers were induced to believe that they were dealing with complainant company instead of said defendant company. A great number of letters were introduced in evidence tending to show that the words "Roos" and "Roos Line"; "Genuine Roos Line"; "Original Roos Line" and "Genuine Roos Red Cedar Chests," had become so identified with complainant's business and the product of its manufacture, especially its cedar chests, (and said defendant company manufactured nothing else) before the organization of defendant companies that the name "Roos" alone, or in such combinations, had acquired a secondary meaning indicating complainant's products, and that dealers were constantly confounding the defendant companies with complainant, largely because of the use of the word "Roos" in their names and the methods employed in its use.

The master found the facts to be as shown by evidence to the effect as above stated, and the decree confirms his findings.

It would subserve no useful purpose to follow the argument of plaintiffs in error into the various details of the evidence so long as we cannot say after reviewing the same that the master's findings, are clearly against the weight of the evidence.

That an appellate court will not disturb the findings of the master when it cannot so say is too well settled to need repetition or citation of authorities.

It follows from what we have said that the two questions for determination stated above, must be answered in the affirmative, as they were in the Johnson case upon a similar state of facts. If so, there is no need to reiterate here the well established legal principles upon which a court of equity will intervene by injunction to prevent unfair competition. The literature upon that subject is voluminous. What was said in the Johnson case covers all that need be referred to for application to the instant state of facts. It meets much that has been discussed in plaintiffs' in error's brief respecting trade marks and trade names, unfair competition, confusion, and personal, family and corporate names. For even if use be made of a personal or family name, as was done in the Johnson case, if the facts disclose that the name has been given a secondary meaning describing and indicating a particular make of goods by a concern using that name, and another concern subsequently enters into the same field of trade with like goods, and through its adopted name or business devices or methods makes such use of the name as to deceive purchasers of the goods, with the result that the goods of the latter are palmed off as the goods of the former, it amounts to unfair competition according to the authorities, against which equity will grant relief. The citation in the Johnson case from Waterman v. Modern Pen Co., 235 U. S. 88, is particularly applicable to the instant state of facts:

> "But, whatever generality of expression there may have been in the earlier cases, it now is established that when the use of his own name upon his goods by a later competitor will and does lead the public to understand that these goods are the product of a concern already established and well known under that name, and when the profit of the confusion is known to and, if that be material, is intended by the later man, the law will require him to take reasonable precautions to prevent the mistake. (Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.,

> 208 U. S. 554.) There is no distinction between corporations and natural persons in the principle, which is to prevent a fraud."

Without further recitation of evidentiary facts it appears that here, as in the Johnson case, the family cognomen was the distinguishing part of the name adopted by the new corporation; and said defendant company adopted to some extent the same sort of advertising or designs as complainant; that the result of the methods used by the defendant company was to create confusion in the minds of the public between the goods manufactured by complainant and those manufactured by it; that there was a great deal of confusion in the correspondence of the two companies showing that the purchasers of cedar chests from defendant company thought they had bought the goods of the complainant, and that the incorporation of the name "Rees" in the names adopted by defendant companies was for the purpose of making use of its reputation with the furniture trade to acquire business from complainant.

It is contended that relief should be denied to defendant in error on account of laches. The bill was filed July 29, 1920, and the actual beginning of business by the Ed. Rees Company of Forest Park, the principal defendant and the only one continuing in the business and which has worked up the greatest amount of trade, was only a little over a year before, up to which time the purpose and effect of the use of the name "Rees" was not so apparent or capable of proof. Nor had the statute of limitations run on the acts of its predecessor after they were manifest. Under the circumstances of the case we do not think the doctrine can be successfully invoked. (Luttrell v. Hyatt, 305 Ill. 274.)

Defendant in error has assigned cross errors based upon the failure of the court to enjoin defendants from using a corporate name containing the word "Rees". The contention is based upon the policy of the statute in force, when the certificates of the corporations concerned were issued, against issuance of a

license to two companies having a same or similar name. The names of the companies are not so similar in themselves, in our opinion, as to justify an injunction against the use of defendant companies' corporate names. But the distinguishing part of their name is the word "Roos," and much of the confusion has arisen from the use of the name "Roos" in the same line of business conducted by complainant with whose goods it has become identified. To be adequate we think the injunction in this case should contain a restriction like that approved in the Johnson case, and therefore should be modified so as to enjoin the use of any one of defendant companies' names on its cedar chests, letter-heads, or business literature or advertising, without the use of the words "Not connected with Roos Manufacturing Company."

Accordingly the decree will be reversed and remanded with directions for such modification, each party to pay his own costs.

AND REMANDED
REVERSED WITH DIRECTIONS.

Fitch, P. J., and Gridley, J., concur.

listener in the [illegible] living a real or vicarious [illegible]. The [illegible] of the [illegible] are not so similar to [illegible], in [illegible], as to justify an injunction against the use of different communicative corporate names. But the distinguishing part of their name is the word "Tone," and much of the [illegible] has arisen from the use of the name "Tone" in the same line of business [illegible] by [illegible] with [illegible] it has been [illegible]. To be adjudged to [illegible] the injunction in this case should [illegible] a [illegible] like that [illegible] in the [illegible] case, and [illegible] should be modified so as to [illegible] the use of any use of [illegible] [illegible] [illegible] or its [illegible] [illegible], or [illegible] [illegible] or advertising, without the use of the words "Tel [illegible] with Tone [illegible] [illegible]."

Accordingly the decree will be reversed and remanded [illegible] for [illegible] [illegible], with [illegible] to [illegible] [illegible].

[illegible]

Bill, J. A., and Shelby, J., [illegible].

7 - 29123

# 236 I.A. 642

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JOSEPH BENEDETTO,
Plaintiff in Error.

ERROR TO CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was found guilty of the statutory offense of assault with a deadly weapon with the intent to inflict bodily injury upon the person of another. The indictment contains three counts, one of which properly charged said offense, and each charges an assault upon one Jacob Gallano.

The person assaulted took the witness stand and said his name was Jacoma Gallano. The witnesses referred to him as "Jack" or "Jake" Gallano, but there was no evidence that he was known by such names, and even if it may be inferred that "Jack" or "Jake" is a nickname for Jacoma, it cannot reasonably be said that Jacob and Jacoma are the same or even idem sonans.

In People v. Stamm, 280 Ill. 300, where the prosecution was upon a like charge, the court said: "In a prosecution for this offense, it must be both alleged and proved that the assault was made with the intent to inflict a bodily injury upon the person assaulted." In People v. Smith, 258 Ill. 502, the victim of the crime was alleged to be Rosetta. The proof was that her name was Rosalia. The court held the variance was fatal and said:

> "The indictment charged a crime against a certain person, but the proof failed to show it and did show a crime, if any, against another person. The doctrine of idem sonans is invoked but is not applicable."

In People v. Hensley, 258 Ill. 548, it was said:

> "In indictments for offenses against the persons or property of individuals the Christian and surnames of the parties injured must be stated if known, and the name stated must be either the real name of the party injured or that by which he is usually known. (Aldrich v. People, 226 Ill. 619; Sykes v. People, 138 Ill. 52; Billin v. People, 1 Scam. 399,) and it is essential that the name of the party injured shall be proved as laid. There is no conflict of authority on this point." (Citing authorities)

In that case the indictment was for obtaining the property of Kapan Manian, and the proof was that it was the property of Kapan Mananianian. The court held that the name was material to the description of the offense, and being a material averment it was necessary to be proved, and a failure to prove it was not a mere variance but a fatal lack of evidence to prove the crime charged, and that there was no question of idem sonans in that case.

Counsel for plaintiff in error cite People v. Heisman, 296 Ill. 186, to the effect that a variance is not essential unless it is made to appear to the court that the jury were misled by it or that some substantial injury was done to the accused thereby. While this case was referred to by the court in the Novotny opinion, it nevertheless decided the latter on the principle above stated, and it is the last expression of the Supreme Court on that subject. There is no room for distinguishing this case from the Novotny case in the application of that principle, which calls for a reversal of the judgment. The crime charged and described in the indictment is an assault upon Jacob Galiano and the proof shows an assault upon Jacoma Galiano, a different offense. In view of this conclusion it is unnecessary to discuss the weight of the evidence or whether there was error in the giving or refusing instructions.

REVERSED AND REMANDED.

Fitch, P. J., and Gridley, J., concur.

29478

73 - 29478

STANDARD OIL COMPANY, (Indiana), a corporation, Appellant,

vs.

PAUL H. KANRADT, Mayor of the City of Calumet, et al., Appellees.

236 I.A. 642

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a mandamus proceeding whereby appellant seeks to compel respondents to issue a permit for the installation of two metal tanks and equipment connected therewith, for the storage of gasoline, at a service station erected on certain premises of petitioner situated in the city of Calumet City, Illinois. A jury was waived and the court found the issues for respondents and rendered the judgment appealed from.

An ordinance of said city relating to the storage of gasoline and other inflammable materials makes it unlawful to install any tank for the storage of any such liquid in any lot or plot of ground

> "Without first obtaining the written consents of the property owners representing the majority of the total frontage in feet of any lot or plot of ground lying wholly or in part within lines two hundred (200) feet distant from and parallel to the boundaries of the lot or plot of ground upon which said tank or tanks is or are to be installed; provided, however, that for the purpose of this ordinance only the frontage of any such lot or plot of ground as comes within the two hundred (200) feet limit herein prescribed shall be considered."

The correctness of the court's finding and judgment depends upon the construction to be given to the word "Frontage" as therein used.

The total frontage involved within the prescribed limits of said 200 feet is, according to plaintiff's contention, 1077.6 feet, and according to respondents' contention, 707.9. On plaintiff's theory the frontage signed for in its petition is 24.4 feet more than a bare majority, and on respondents' theory 25.46 feet less than a majority. The difference of their respective contentions lies in the fact that in computing the "frontage" plaintiff includes the side as well as the 'front' dimensions of three corner lots (and of a small part of another) on the theory that the "frontage" of a corner lot includes the boundary line on both streets. These three lots are respectively 20x107.7 feet, 25x127.1 feet and 25x127 feet, and the signatures of their owners were procured by petitioner.

If their "frontage," as the term is used in the ordinance, includes the boundary line on both streets then plaintiff has obtained signatures for the requisite frontage, otherwise not.

To support its construction appellant has cited various cases where the court construing a particular instrument or ordinance before it held that a corner lot has a frontage on both streets. In those cases that interpretation was held to express the apparent intention of the particular instrument or ordinance before the court for construction. But we do not think that interpretation accords with the intent and purpose of the ordinance before us.

As the storage of inflammable material is usually attended with possible danger, and tends to depreciate the value of neighboring property by reason thereof, it was manifestly the purpose of the ordinance not to allow its storage on any lot or plot without first obtaining the consent of the owners of the property that might be affected thereby. To that end

it fixed the limits of property that might reasonably be supposed to be affected and also the basis upon which such consent should be determined. That basis was fixed, not upon the number of owners, which would give the owners of small lots an unduly preponderant influence in the matter, but upon the property affected, evidently with the intention of giving to each owner a fairly proportionate voice in a matter affecting all alike. To that end a basis of "frontage in feet" was fixed, and "only" the frontage was to be considered thus intending, as we think, to distinguish the front of the lot, as that term is commonly used, from its side or length. While more exact language might have been employed, yet we think it sufficiently plain to indicate that such distinction was intended. Such interpretation gives to each owner a fairly proportionate voice in determining a matter in which all are interested alike. But the proportion would be unequal and out of harmony, we think, with the intent and purpose of the ordinance, if the owner of a corner lot can have a voice and influence commensurate with two dimensions of his lot, whereas others with a like interest would be limited to an influence measured by only one dimension. As an illustration, one of the corner lots involved has the same dimensions (25 feet by 137.1 feet) as four inside lots in the same block and limits. Yet under plaintiff's theory the consent of the owner of the corner lot would outweigh the non-consent of the owners of said four inside lots.

We think it was to prevent just such inequality that the ordinance states that "only the frontage * * * shall be considered," thus referring, as we think, to the front of the lot only, and giving the word a meaning applicable to every

lot alike. Thus construed each owner would have the same proportionate voice in giving or refusing his consent.

> "In construing ordinances, no less than statutes, all general provisions, terms, phrases and expressions should be liberally construed, in order that their true intent and meaning may be fully carried out; and where great inconvenience or absurd consequences would result from a particular construction, that construction should be avoided if possible." (Harrison v. People, 183 Ill. 466, 471.)

Observing this rule we think the judgment should be affirmed.

As contended by appellant, we think the court erred in receiving documentary evidence relating to certain special assessments levied upon some of the property within said limits. But as the case was tried without a jury and the court construed the ordinance correctly, as we think, regardless of such evidence, the judgment should not be reversed for such error.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

39949

236 I.A. 643

FIRST CHICAGO METHODIST EPISCOPAL CHURCH AID SOCIETY, a corporation,
Appellee,

vs.

DAVID A. GOODMAN and WILLIAM GOODMAN, doing business as GOODMAN BROTHERS,
Appellants.

INTERLOCUTORY APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a temporary injunction granted upon a sworn, unanswered bill of complaint which charges the breach of a negative covenant in a lease from complainant to defendants of certain stores on the main floor of a large office building.

Said covenant is in the form of a rule of the lessor, which is made a part of the lease and which the lessee covenanted to observe, perform and abide by.

The pertinent part of the rule reads as follows:

> "Rule 1. No sign, picture, advertisement, or notice shall be displayed, inscribed, painted, or affixed on any part of the outside or inside of said building, or on or about the premises hereby demised, except on the glass of the doors and windows of said premises and on the Directory Board of the Building, and then only of such color, size, style and material as shall be first specified by the lessor in writing on this lease. * * And any breach of this covenant shall be restrainable by injunction."

In violation of said rule the bill sets up that defendants have posted twelve large signs on the front windows, some of them about four feet square, each containing the following in large letters, part in red and part in black: "Bankrupt Sale Entire Stock Men's Furnishings of the Madison Shirt Company now being sold at less than wholesale cost." The bill also alleges that defendants have also large bankruptcy sale signs displayed in various parts of the

interior of the stores indicating that the stock of goods is offered for sale and sold under a bankruptcy proceeding, and that such signs were continued to be posted after the bankruptcy and receivership proceeding had been terminated. The bill charges that these signs and advertisements were posted without complainant's consent; that they have a tendency to prevent the rental of other space in the building at a fair and reasonable rental; that said acts constitute irreparable injury, and asks for an injunction restraining defendants from posting or displaying any sign, advertisement or notice in and about said stores, in violation of said covenant, until the further order of the court. The injunction practically follows the prayer of the bill.

Appellants contend that the quoted language in the rule is not sufficiently clear and certain to entitle the appellee to injunctive relief. They fail to point out, and we fail to see, in what respect the contention is tenable.

The next contention, that there is an adequate remedy at law, seems to ignore the well settled principle that where there is an express negative covenant, a court of equity will entertain a bill for injunction to prevent its breach, although the same will occasion no substantial injury, or though the damages, if any, be recoverable at law. (Consolidated Coal Co. v. Schmisseur, 135 Ill. 371, 378.) "This," said the court in the case cited, "is upon the principle that the owner of land selling or leasing it may insert in his deed or contract just such conditions and covenants as he pleases touching the mode and enjoyment of the use of the land." (See, also, Star Brewery Co. v. Primas, 163 Ill. 652; Southern Fire Brick Co. v. Sand Co., 233 Ill. 616, 626.) In the last cited case the court said: "The right to an injunction for the enforcement of

negative covenants in contracts is independent of the question as to whether an action at law will lie or not." The same doctrine is recognized in Carlson v. Kosmar, 226 Ill. 15, cited by appellants, but in that case there was no express negative covenant to be enforced. It is unnecessary to cite other authorities on this subject.

The application of the principle referred to renders it unnecessary to discuss appellants' other points, that equity will not enforce a contract where personal property rights alone are involved, and that aesthetics lie beyond the cognizance of either law or equity, and that where the rights of parties are doubtful a court of equity will weigh and consider the comparative injuries of the parties to a suit. Besides they have no application to the facts set up in the bill. The injunction order will be affirmed.

AFFIRMED.

Fitch, P. J., and Gridley, J., concur.

5 - 29151

CLARENCE LASIER and
JOSEPHINE LASIER,
Plaintiffs in Error,

vs.

J. JOSEPH WRIGHT, as executor under an instrument in writing admitted to probate as the last will and testament of CHARLES H. HAINES, deceased, MERCY HOSPITAL OF CHICAGO, CHARLES J. LEGGETT and others,
Defendants in Error.

236 I.A. 643

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

STATEMENT BY THE COURT. Complainants seek by this writ of error to reverse a decree of the Circuit Court of Cook county, entered May 8, 1933, sustaining general demurrers to their amended bill of complaint and dismissing said bill for want of equity. The action was commenced on December 16, 1932.

In his printed brief and argument here filed counsel for complainants states that both the original and amended bills (as appears from their prayers) were filed "For the purpose of having certain orders, entered by the Circuit Court of Lake county and affirmed by the Supreme Court of Illinois (Lasier v. Wright, 304 Ill. 130) vacated, set aside and declared null and void;" also for an injunction restraining certain defendants from enforcing said orders and thereby acquiring any right, title or interest in certain real and personal property, and especially restraining the defendant, J. Joseph Wright, as executor under a certain instrument in writing (dated January 15, 1907, and admitted to probate as the last will and testament of Charles H. Haines, deceased, by the probate court of Lake county) from closing said estate and distributing the assets thereof; and also for the entry of an order setting aside said order of probate and directing the probate, in lieu thereof, of another instrument in writing, dated March 7, 1887, as the last will and testament of said Haines.

In the amended bill it is alleged in substance that on July 24, 1914, said Charles H. Haines died testate at St. Charles, Kane county, Illinois, leaving as his only heir at law and next of kin his mother, Harriet S. Haines, - also leaving numerous parcels of real estate in Cook and Kane counties and a large amount of personal property; that following his death the said instrument in writing, dated January 15, 1907, was admitted to probate in the probate Court of Kane county on September 2, 1914, as his last will and testament, and said J. Joseph Wright, nominated therein as sole executor, was appointed as such executor and entered upon his duties; that said instrument provided for the payment of the entire net income from his estate to his mother during her lifetime, and, upon her death, after mentioning one devise of four lots of land and two bequests of $10,000 each to certain named individuals, all the remaining estate was devised and bequeathed, two-thirds to Percy Hospital of Chicago and one-third to the Trustees of School District No. 87, in the Township of St. Charles, Kane county, Illinois; that on March 28, 1915, said Harriet S. Haines died at St. Charles, Illinois, leaving complainants, her grand-nephew and grand-niece respectively, and others, as her only heirs at law and next of kin; that thereafter some of said other heirs at law died, themselves leaving heirs at law and next of kin; that said Wright performed the usual duties of an executor, received and disbursed moneys, delivered up portions of the estate to the named beneficiaries, and in January, 1920, filed his final report and account, and asked for its approval and for his discharge as executor; that during all this period of his acting as executor, from 1914 to 1920, he had in his private safety deposit box in Chicago, "a certain last will and testament of said Haines, bearing date March 7, 1907," which he knowingly and wrongfully, and in disregard of the provisions of section 12 of the Illinois Wills act, withheld from said probate court and

from complainants and their co-heirs until February 29, 1920, when he first disclosed the same and filed it with the clerk of said court; that "said last will and testament of 1887 dispenses of the entire estate of the testator, Charles H. Haines, in a manner wholly different from and inconsistent with the provisions of the instrument in writing of 1907, and devises and bequeaths the entire real and personal estate to said Harriet S. Haines, who survived him, but who subsequently died in March, 1915;" that said will of 1887 "was executed with all due compliance with the essential requisites of the statute with respect to the execution and attestation of legal and valid wills and by a testator who was possessed of testamentary capacity of unquestioned sufficiency to entitle him to make a testamentary disposition of all of his property, * * and * * the same would remain his legal and valid last will and testament, unless and until it shall have been revoked in the manner expressly provided by statute," viz: Section 17, Illinois Wills Act; that said section 17 provides the only modes and manners by which a valid and legal will may be revoked in Illinois; that it appears on the face of said instrument of 1907 that it does not declare the revocation of said last will of 1887, which had remained in the possession of said testator until his death, and said instrument of 1907, does not meet the essential requisites of said statute to effect a revocation of a valid and existing last will; and that, hence, the execution of said instrument of 1907 did not affect the validity of said last will of 1887, "which became, upon the death of said Haines, his only legal and valid last will and testament." Copies of the two instruments of 1887 and of 1907 are attached to and made parts of the bill.

It is further alleged in substance that in February, 1920, complainants instituted proceedings for the probate of said will of 1887, and to set aside and vacate the order of

September 8, 1914 (admitting said instrument of 1907 to probate) but that, on April 6, 1920, the probate court of Kane county denied the petitions; that upon appeal taken, the circuit court of Kane County, on October 18, 1920, entered an order (copy attached to the bill) to the effect that said order of probate should not be set aside, that said alleged will of 1887 should not be admitted to probate or decreed to be the last will of said Haines, and that said instrument in writing of 1907 should be decreed to be his last will and testament; and that, upon a further appeal being taken, the Supreme Court, on October 21, 1921, rendered a majority opinion, from the copy of which attached to and made a part of the bill it appears that the court ordered that the judgment appealed from be reversed and the cause remanded with directions. It is further alleged that subsequently, upon a rehearing having been granted to appellees, the Supreme Court rendered a second opinion, from a copy of which also attached to and made a part of the bill it appears that the court affirmed the action of the circuit court. It is further alleged that subsequently a second rehearing was granted on the petition of Clarence Lasier (one of the present complainants) and that on June 21, 1922, a third opinion was rendered by the Supreme Court. A copy of this opinion is also attached to and made a part of the bill, and it has been published in the Supreme Court reports (304 Ill. 136), together with a dissenting opinion concurred in by two of the justices. The conclusion of the majority opinion is (p. 150) that "the judgment of the circuit court denying the petition to vacate the order admitting the will of 1907 to probate and denying probate of the will of 1887 is affirmed."

It is further alleged in the amended bill that, following the rendition of said decision of the Supreme Court, Clarence Lasier filed another petition for a rehearing, which the Supreme Court "refused to consider and ordered stricken;" that in said

petition it was suggested (1) that the judgment of the circuit court of Kane county, as affirmed by the Supreme Court as aforesaid, "was not in conformity with section 17 of the Mills Act;" (2) that the only manner by which said judgment could be sustained, or the Supreme Court could affirm it, "was by definitely altering, changing, modifying, adding to, enlarging or restricting said section 17," and that this "no Court had power to do, and as such an attempt would be judicial legislation and result in a decree or order that was wholly null and void; (3) that the "attempt" of said circuit court to enter said judgment, and of the Supreme Court so to affirm it, "was an invasion and encroachment upon the province of, and the usurpation and exercise of the functions of, the legislative branch of the government, which is in direct contravention of both Federal and State constitutions;" (4) that the entry of the judgment of said circuit court, and its affirmance by the Supreme Court, "lacked the essential elements of due process of law and deprived complainants of property rights," as guaranteed by said constitutions; and (5) that said judgment, and said affirmance, "did not follow the orderly administration of justice in accordance with the established law of the land." A copy of said petition for rehearing is attached to and made a part of the bill. It is a document of 57 printed pages, and the points are elaborately argued.

The bill then sets forth Article III and Section 1 of Article IV of the present Constitution of Illinois, and further alleges that, by virtue of these provisions, the only power existing in Illinois, whereby laws may be enacted or repealed, amended or altered, changed or modified, is vested in the legislative branch of the government, and no other branch has the power to invade the same, or to usurp the functions thereof, and "any attempt judicially to legislate is in direct contravention of the Illinois Constitution and any order or decree entered in such

mode or manner is coram non judice and wholly null and void;" that said judgment of the circuit court of Kane County, affirmed by the Supreme Court, "constitutes an act of judicial legislation, wherein the court has deliberately invaded and encroached upon the province of and usurped and exercised the functions of the legislature of Illinois, and has definitely altered, changed, modified, and added to said Section 17 of the Wills' Act;" that neither said circuit court nor said Supreme Court "had the power or authority to interpose or interpolate into said section 17 its personal beliefs or ideas of what the law should be, nor had either Court the power or authority to change or alter, enlarge or restrict, or modify or amend, said section 17, by reading into the same words expressing the opinion of the Court in the light of wisdom or private or public good, for neither said circuit court nor the Supreme Court is concerned with the wisdom of said section 17, or with the motives that prompted the legislature of Illinois to enact it, but only are these Courts concerned with their duty to declare said section 17 in the manner in which the legislature has enacted it."

The bill then sets forth a portion of Amendment V, and Section 1 of Amendment XIV of the Constitution of the United States; also a portion of Article 2 of the Ordinance of 1787; also Section 2 of Article II of the present Illinois Constitution; and further alleges that, by reason of said judgment of the circuit court, affirmed by the Supreme Court, complainants, and their remaining co-heirs at law and next of kin of Charles H. and Harriet S. Haines, both deceased, "have been denied due process of law," as guaranteed to them under said Constitutions and said Ordinance of 1787, and "have been denied the orderly administration of justice in accordance with the established law of the land;" that the law of the land, in this proceeding, "is laid down by section 17 of the Wills' Act, together with determinations of the Supreme Court

of Illinois, relative thereto, rendered respectively in 1872, 1897, 1903, 1912, 1914, 1915 and 1919, covering a period of substantially 50 years;" that the judgment of said circuit court, so affirmed, "is a wholly unusual, unreasonable, new, different, anomalous and void determination of the law, in direct conflict with and wholly antagonistic to the established law of the land;" and that by said judgment, so affirmed, "the express provisions and requisites of said section 17 have been completely ignored, the sense and meaning thereof changed and altered * * and the established precedents, as laid down by the Supreme Court, over a period of almost 50 years have been overruled and overturned, without regard for the established doctrine of stare decisis, disregarding the fact that said section 17 is a rule of property, controlling property rights, and has been a part of the Statute Law of Illinois for more than 90 years, without alteration, amendment or repeal."

It is finally alleged in the bill that said section 17 of the Wills' Act is a rule of property; that the rights, titles and interests which complainants acquired in and to the real and personal property of said Haines, by virtue of said will of 1887, are property rights; that "a rule of property or a property right is a contractual right, and a State court cannot, by a judicial decision, any more than a State legislature can by a statutory enactment, impair the obligations of a contract;" and that said circuit court of Kane County, by its said judgment of October 18, 1920, and the Supreme Court by affirming such judgment, "did, by judicial decision, impair the right of contract," which complainants had in and to the property of said Haines, by reason of their property rights acquired under said will of 1887, and the rule of property as laid down by section 17 of the Wills' Act.

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In view of the allegations of complainants' amended bill, disclosing the protracted litigation which preceded its filing and the final settlement thereof by the decision of our Supreme Court on June 21, 1928, it seems to us that the present equity proceeding is a most unusual one. Counsel for complainants is evidently of the same opinion, for his first point, made and argued in his printed brief, is that "the mere fact that a proceeding in equity is unusual or different or does not follow a known or recognized precedent, does not bar a court of equity from entertaining jurisdiction over the same and granting full relief." Another of counsel's points is, that where a court exercises a power and an authority which it does not possess its judgment is void, and one who is injured by such void judgment may attack it collaterally and be granted equitable relief against it. The conclusion of this legal proposition may be admitted if the stated premise is so in fact. In discussing this proposition counsel makes certain statements and concessions. He says that at the hearing on the demurrers in the trial court defendants' solicitors so misconceived the character and scope of the bill that they repeatedly urged that apparently complainants were endeavoring to have the trial court reverse the Supreme Court. It is not surprising that it was so urged. But counsel further says that complainants seeks to accomplish no such end; that, having exhausted their remedies of direct attack against the judgment order of the circuit court of Kane county by appeal to the Supreme Court, and having been denied relief by the final opinion and order of the Supreme Court, "they simply come into equity and collaterally attack that judgment by showing that it is coram non judice and void;" and that the final judgment order of the Supreme Court "is, also, coram non judice and void." Counsel further says

that "complainants concede that the probate and circuit courts of Kane County and the Supreme Court of Illinois had jurisdiction * * to construe and apply section 17 of the Wills' Act, when properly before them," and that "all three of these courts had jurisdiction of the parties interested and involved in these proceedings, but complainants do not concede that all or any one of these three courts, while exercising jurisdiction over the subject matter and the parties involved, had any power or any authority to exercise the jurisdiction of the Legislature of the State of Illinois, and, by usurpation and encroachment, proceed to amend, alter, add to, modify and change said section 17, and, having done so, proceed to apply said section 17, same amended, altered, added to, modified and changed, to the subject-matter involved, namely, the question whether or not the legal and valid last will and testament of 1887 had been revoked by the instrument in writing of 1907." In another part of his brief counsel further says that "there is nothing vague, doubtful, uncertain or ambiguous in the wording of the Illinois statute." In view of the entire proceedings before the Supreme Court, as alleged in the bill, this is a surprising statement.

Considering all of counsel's statements, as well as his concessions, and the allegations of the bill, the present proceeding amounts to a collateral attack upon the final decision and opinion of the Supreme Court upon the ground that the court, in construing section 17 of the Wills' Act in a certain way, exceeded its powers and usurped the functions of the legislature of the State. In our opinion there is no equity in the bill or proceeding. It is one of the fundamentals of American jurisprudence that the courts have the power and it is their duty to interpret and construe statutes enacted by the legislature and to declare the meaning thereof. (Londoner v. Denver, 210 U. S. 373, 379; Wolfe v. McCaull, 76 Va. 876, 880.) That the Supreme Court was called upon

to interpret and construe said section 17 in deciding the case is shown in the opinion of the Court, which is made a part of the bill. After quoting the section the Court says (p. 137): "Our section on revocation expresses the entire law upon the subject of the manner in which a former will may be revoked by a subsequent will, testament or codicil, and the settlement of the question now before us depends solely and only upon the correct interpretation of that section in so far as it bears upon the question." And further says (p. 145): "The real question before us, whether or not a former will is revoked by a later and perfectly executed will by a testator of sound mind disposing of all his property in a manner entirely inconsistent with such former will and without expressly revoking it, and where both wills are preserved by the testator, has never been passed on by this court, when actually presented for decision." And further says (p. 149): "We are thoroughly convinced that the testator in this case meant that his will of 1907 was his only will when he declared it his last will and in which every disposition of his property is absolutely inconsistent with the former will of 1887, and that there is no provision of our statute that requires us to declare otherwise by reason of the fact that there is no express declaration in it in terms saying that it is his only will or declaring that all former wills are revoked. When a testator makes a will absolutely inconsistent with all other wills and declares it his last will and testament, such acts of necessity amount to a declaration that all former wills are revoked. The word 'declare', as defined by the lexicographers, means primarily to make known; to make manifest; to make clear; to present in such a manner as to exemplify; to disclose; to reveal. The testator in this case, within the meaning of the statute, has declared a revocation of his former will by impliedly saying in every clause thereof that the will he was then executing was his will and his complete and only will. It

was not necessary to use express words in terms declaring such revocation. The statute makes no such requirement."

Complainants' counsel further contends that, by reason of the "void" judgment of the circuit court of Kane County and the "void" judgment order of affirmance by the Supreme Court, complainants have been "denied due process of law," have been "deprived of rights of property," and that "their contract rights in the premises - a rule of property being a contract right - have been impaired." We cannot see wherein they have been denied due process of law or deprived of any rights of property, or what "contract" rights they had to be impaired. Coupled with these contentions is the further one that the doctrine of stare decisis "is directly applicable to and should be enforced in this proceeding." Several prior cases decided by our Supreme Court are referred to in which, as counsel claims, section 17 of the Wills' Act received a construction contrary to that adopted in the Supreme Court's opinion of June 21, 1923. Two of the cases referred to are Stetson v. Stetson, 200 Ill. 601, and Limbach v. Limbach, 200 Ill. 94. The holding in these two cases is referred to in said opinion of June 21, 1923, wherein it is said (p. 146): "There can be no question as to the meaning of the language used in the Limbach case and of that quoted or referred to therein from the Stetson case, but in making such a holding or declaration we are now convinced we erred." And counsel's argument in reference to the applicability of the rule of stare decisis is, in substance, that a construction of a statute, made and continued over a long period of time, becomes in the nature of a rule of property from which flows a contractual right, and that a change of judicial interpretation by a court amounts to impairing the obligation of a contract, prohibited by the Federal Constitution. We cannot agree with the contention or argument. In National Mutual Building Association v. Brahan, 193 U. S. 635, 647, it is held in substance that a

decision of the highest court of a State, overruling or changing a previous decision construing a statute and declaring void a contract made in reliance upon the previous decision, does not constitute a law impairing the obligation of a contract within the meaning of the Federal Constitution. (See, also, Prall v. Burckhardt, 299 Ill. 19, 42; Ross v. Oregon, 227 U. S. 150, 161; Moore-Mansfield Construction Co. v. Electrical Installation Co., 234 U. S. 619, 624; Cleveland & Pittsburg R. Co. v. Cleveland, 235 U. S. 50, 53.) In the case last cited it is said: "It is equally well settled that an impairment of the obligation of the contract, within the meaning of the Federal Constitution, must be by subsequent legislation, and no mere change in judicial decision will amount to such deprivation." And in Mobile Transportation Co. v. Mobile, 187 U. S. 479, 491, it is held in substance that where the highest court of a State has itself put a construction upon an act of its own legislature, even though it has changed its construction of the act, the decision of such State court is obligatory upon the Supreme Court of the United States. Counsel further argues that "where a construction has been placed upon a statute regulating wills, which has been followed for many years, and many persons have acted upon the faith that such construction was correct, and have rested the disposition of their property upon that belief, the court may not disturb it, even though doubtful as to its correctness." As applied to the present proceeding, in view of the opinion of our Supreme Court of June 21, 1932, and the allegations of the bill, we think that the argument is lacking in merit. It is said in Prall v. Burckhardt, 299 Ill. 19, 41, that "the rule of stare decisis is founded largely on considerations of expediency and sound principles of public policy," and that "the rule should be adhered to unless it appears that the principle established must be productive of greater mischief to the community than can possibly ensue from not following previous decisions on the sub-

ject," yet our Supreme Court in that case, and for reasons stated, refused to follow repeated holdings of the Court over a long period of time, decided the case adversely to those holdings, and, quoting the language of a former opinion, said (p. 39): "It is highly important that the decisions of the court effecting the right to property should be uniform and stable; but cases will sometimes occur in the decisions of the most enlightened judges where the settled rules and reasons of the law have been departed from, and in such cases it becomes the duty of the court, before the error has been sanctioned by repeated decisions, to embrace the first opportunity to pronounce the law as it is." And quoting from an Indiana case, further said (p. 40): "The law is a science of principles, and this cannot be true if a departure from principle can be perpetuated by a persistence in error."

Our conclusion is that the action of the circuit court of Cook County in sustaining the demurrers to complainant's amended bill was correct, and that its decree dismissing the bill for want of equity should be affirmed, and it is so ordered.

AFFIRMED.

Fitch, P. J., and Barrett, J., concur.

21 - 29418

ANNA D. SIELAFF, administratrix of the estate of WILLIAM C. SIELAFF, deceased,
Plaintiff in Error,

vs.

JAMES H. BENNETT, FRANK A. MILLER and FRANK J. HAIBERT, copartners as JAMES W. BENNETT & COMPANY,
Defendants in Error.

236 I.A. 643

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On September 20, 1920, William C. Sielaff commenced an action of assumpsit against the three members of said partnership and W. J. Krueger and W. P. Harris. Plaintiff's declaration consisted of the common counts, to which said three members and Harris, jointly, filed a plea of the general issue, and Krueger filed a similar plea. No further proceedings were had until May, 1923, when the court, on Krueger's motion, ordered plaintiff to file a bill of particulars, which he did. It is stated in the bill of particulars in substance that during the year 1920, plaintiff paid to said firm of Bennett & Co. the sum of $11,040 for certain securities purchased; that while these securities were in the possession of the firm, Krueger and the other defendants "improperly and wrongfully used" the same, or the proceeds thereof, without plaintiff's consent, and "traded on the same or otherwise misappropriated them," so that they were lost to the plaintiff; that Krueger was a trader or speculator in stocks, etc., in the office of said firm, and he "executed the trades in question by, through or in connection with" said firm, which was then engaged in a stock brokerage business in Chicago; and that he, and all other defendants, "were cognizant of the wrongful and improper dealings with plaintiff's securities, or the proceeds thereof, as aforesaid, and * * well knew of the

aforesaid conversion or misappropriation of plaintiff's assets." A trial was had in December, 1923, during which considerable oral and documentary evidence was introduced on behalf of the then plaintiff, William C. Sielaff, who was then living and who testified as a witness. At the conclusion of his case a motion was made, on behalf of the three members of the defendant firm and Harris, to exclude from the jury all the evidence offered on the ground of a variance between it and the allegations of said bill of particulars, but their attorney at the time did not indicate specifically wherein there was one. The court denied the motion. Sielaff then dismissed the action as to defendants, Krueger and Harris. Thereupon the three remaining defendants (the members of the firm of Bennett & Co.) by their attorney, moved the court to direct the jury to find the issues in their favor. This motion was granted, the jury were so instructed and they accordingly returned such a verdict, and judgment was entered thereon against Sielaff for costs. The main contentions here of the administratrix of Sielaff's estate are that the court erred in directing the jury to return such verdict and in entering the judgment.

The evidence introduced by Sielaff tended to show the following facts in substance: In March, 1920, the firm of Bennett & Co. was engaged in a stock and grain brokerage business with offices in the Postal Telegraph Building, Chicago. Harris was an employee of the firm. Krueger maintained business relations with it but was not an employee. Sielaff had certain money which he desired to invest in securities and so informed his friend Krueger, and the latter, stating that he had been buying and selling stocks for many years and had acquired a knowledge of what were good securities, offered to assist Sielaff in making the selection and made out a list of securities recommended by him. During March, 1920, Krueger took Sielaff to the office of Bennett & Co., and a representative of the firm said that, if Sielaff

desired to purchase certain stocks according to the list presented, a cash deposit of $2,000 would be required. This was made and within a few days Sielaff paid Bennett & Co. $7,000, and also $2,080, making the total sum of $11,080. All of the stocks purchased, except two or three, were delivered to Sielaff and he signed appropriate receipts. At this time Krueger suggested that Sielaff do a little "trading" in other stocks on margins, and the latter consented and bought a few stocks of Bennett & Co. which were not delivered to him. Harris asked if Krueger was authorized to trade in stocks in Sielaff's name, to which question the latter replied in the negative, but that Krueger was authorized to order a sale of the stocks then purchased on margins when the price was right. Notwithstanding Sielaff's instructions Krueger traded in various stocks on Sielaff's account through Bennett & Co., and with the knowledge of Harris, and upon Sielaff being advised of this he again objected to such proceedings. Later Krueger telephoned Sielaff to the effect that a profit of $2,800 had been made on the stocks purchased on margins, and a luncheon conference was had between them, at which Harris was present. Sielaff again objected to Krueger trading in stocks on his account with Bennett & Co., but finally consented that Krueger might continue to do so, but only to the extent of said profit of $3,800. Krueger continued to trade in stocks on Sielaff's account. Thereafter, upon Sielaff discovering that on certain of the stock certificates, which he had previously purchased, his name had been misspelled, he took them back to Bennett & Co. for correction. Thereafter Harris telephoned Sielaff that, as a result of Krueger's further trades in stocks on Sielaff's account, there was a loss of $6,000. Sielaff immediately called at the office of Bennett & Co., saw Harris and Krueger, expressed surprise at the turn of events as it had been clearly understood that Krueger was only to continue

trading to the extent of said profit of $2,500, and any losses were to be limited to that figure, but Sielaff was informed that, unless he "margined" his account, he would be sold out. Krueger promised to make back the loss, saying that it could easily be done, etc., and Sielaff finally consented to further trading in stocks and grain, through Harris, and subsequently turned in to Bennett & Co., as security, the balance of the stocks which he in his first transaction with the firm of Bennett & Co. had purchased outright from it. Thereafter Harris traded in various stocks and grain, through Bennett & Co., for Sielaff's account, with the result that about September 1, 1930, the claimed losses to Sielaff amounted to about the sum which he had paid for the securities originally purchased. All of said securities, so deposited with the firm of Bennett & Co. were sold and converted into cash to make good these losses, leaving a balance to his credit in the hands of said firm, according to its books which showed the various transactions in detail, of less than $50.

All of Sielaff's transactions with Bennett & Co. occurred within a period of six months, and within the six months next preceding the commencement of his suit. His position on the trial was in substance that Bennett & Co. had unlawfully converted to its own use money, and securities or the proceeds thereof, which in equity and good conscience should be returned to him, and he took the further position that all of the transactions (except the first one when he purchased the said securities outright) were gambling transactions, in violation of the provisions of section 132 of the Criminal Code, and that the money or securities lost by reason of said transactions could be recovered back in an action in <u>assumpsit</u> (as was this action) for money had and received. The statute referred to provides in part as follows:

"Any person who shall, at any time or sitting, by playing at cards, dice or any other game or games, * * or by any wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, lose to any person, as playing or betting, any sum of money, or other valuable thing, amounting in the whole to the sum of $10, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same, shall be at liberty to sue for and recover the money, goods or other valuable thing, so lost and paid or delivered, or any part thereof, or the full value of the same, by action of debt, replevin, assumpsit or trover, or proceeding in chancery, from the winner thereof, with costs, in any court of competent jurisdiction. In any such action at law it shall be sufficient for the plaintiff to declare generally as in actions of debt or assumpsit for money had and received by the defendant to the plaintiff's use, * * without setting forth the special matter. * * ."

It has been held that a broker selling securities deposited with him by a party to cover losses on a gambling contract between them for the purchase and sale of stocks, or grain, is a "winner" within the meaning of said statute (Jamieson v. Wallace, 167 Ill. 388; Kruse v. Kennett, 161 Ill. 196); and is liable as a "winner" for losses to his customer, if there was an understanding between them that there was to be a settlement between them on differences only, and that there was to be no right on the part of the customer to demand and receive the stocks or grain or any obligation to take or pay for them. (Kalouse v. Slaughter, 241 Ill. 215.) On the trial, to support said further position, plaintiff testified that, aside from the stocks originally purchased and delivered, he had no intention to take or make any deliveries of stocks, and no intention to take or make deliveries of grain, but that in all the transactions (except the first) he intended to trade in differences, taking profits or losses as they might arise. There was also evidence tending to show that Bennett & Co. had a similar intention as regards said transactions; that about $375,000 worth of stocks were purchased for Gielaff and about $365,000 worth of stocks were sold for his account; and that thousands of bushels of grain were purchased

and sold for his account.

After reviewing the evidence we are of the opinion that the trial court erred in instructing the jury to find the issues in favor of Bennett & Co., and in entering judgment upon that verdict. There was sufficient evidence, we think, tending to show an unlawful conversion on the part of Bennett & Co., of some of Sielaff's money, or the proceeds of some of his securities, and, also, that Bennet & Co. was liable as a "winner" in said assumpsit action under the provisions of said statute, as to require the submission of the case to the jury. (Libby, McNeil & Libby v. Cook, 222 Ill. 206, 213; Hirsch v. Forschner Contracting Co., 312 Ill. 343, 347; Kizer v. Holden, 198 Ill. 274, 287; Illinois Trust & Savings Bank v. La Touche, 101 Ill. App. 341, 345; Eastern Farmers Grain Co. v. Fernandes Grain Co., 229 Ill. App. 102, 107.) And we do not think that because of any variance between the allegations of Sielaff's bill of particulars and the evidence offered by him, the actions of the trial court now complained of should be upheld in this appellate court. When the attorney for Bennet & Co. raised the question of the alleged variance in the trial court he did not indicate wherein there was one, so as to enable Sielaff's attorney to make a proper amendment to his bill of particulars, and the question of variance should not be raised now. (Probst Construction Co. v. Foley, 166 Ill. 21, 33.)

For the reasons indicated the judgment of the circuit court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Fitch, P. J., concurs;
Barnes, J., dissents.

MR. JUSTICE BARNES DISSENTING:

No cause of action as alleged, was proven, unless there was evidence tending to show a gambling transaction within the

meaning of the statute. Without further proof of the actual transactions, when and with whom they were had, or further proof to disclose that defendants did not enter into binding contracts for plaintiff's benefit and use. I fail to see that there was any evidence which legitimately tends to show any intention on the part of defendants to gamble. It is equally consistent with perfectly legal transactions.

23 - 20421

236 I.A. 643

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| PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, | ERROR TO |
| vs. | MUNICIPAL COURT |
| | OF CHICAGO. |
| SAM GARBER, Plaintiff in Error. | |

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Defendant, Sam Garber, was found guilty by a jury in the Municipal Court of Chicago of a misdemeanor, viz. of a violation of an Act "to punish the making, drawing, uttering or delivering of checks, drafts or orders for the payment of money with intent to defraud," approved May 26, 1917 (Smith-Hurd's Stat., 1923, Chap. 38, Sec. 289), and, on June 30, 1922, was adjudged guilty and sentenced to the House of Correction for 90 days and to pay a fine of $100, after his motions for a new trial and in arrest of judgment had been ~~[illegible]~~ overruled.

The information, as amended on its face and re-sworn to on the day of the trial by leave of court, was signed by Benjamin Angel, and charged that

> "Sam Garber, heretofore, to-wit, on the 1st day of November, A. D. 1921, at the City of Chicago aforesaid, unlawfully and knowingly did make, utter and deliver to this affiant a certain bank check for the payment of money, drawn on the Northwestern Trust and Savings Bank, of Chicago, Ill., and did thereafter obtain from this affiant personal property to the value of $4[illegible]6, the said Sam Garber then and there well knowing at time of making and delivery of said bank check he did not have sufficient funds on deposit in said bank or credit with said bank for the payment of the said check, all with intent to cheat and defraud this affiant of said sum of money, in Vio. House Bill 59 (not sufficient funds), contrary to the form of the Statute," etc.

On the trial the prosecuting witness, Benjamin Angel, testified in substance that he lived at the Palmer House, Chicago; that he was "employed as Chicago representative for the firm of Gantor & Angel, engaged in the fur business in New York City" - their Chicago office being located at said Palmer House; that on November 1, 1921, Garber came there, saw the witness, purchased certain furs of the value of $765, and took them away; and that he (Garber) delivered to the witness at the time his check for $400 and his note or "trade acceptance" for $365, and also signed and delivered a receipt for the furs, which papers the witness immediately sent to the firm of Gantor & Angel at New York City. The check and receipt were identified by the witness and introduced in evidence. The check, signed by Garber and dated November 1, 1921, directed the Northwestern Trust and Savings Bank to pay to the order of Gantor & Angel, the sum of $400. It bore the blank endorsement of Gantor & Angel, and was marked on its face "N.S.F.", and as having been protested by a notary public on November 7, 1921. The receipt, signed by Garber, showed that Gantor & Angel had sold the furs to Garber on "Terms, $400 cash, $365 Dec. 1." On behalf of the People, Joseph Nemzewski, having personal charge of the bookkeeping department of the said Northwestern Bank in November, 1921, also testified that on November 1, 1921, Garber had an account with said bank. He was then asked the question: "What was the condition of the account of Sam Garber with your bank on November 1, 1921?" Over specific objections to the question by Garber's attorney the court allowed the witness to answer as follows: "Sam Garber's account was overdrawn, and our records show that he issued five other checks about that time." The witness further testified that on November 7, 1921, when said $400 check was presented to the bank for payment, Garber had on deposit $125.

At the conclusion of the People's evidence, as above, Garber's attorney moved for a directed verdict of not guilty upon the grounds in substance that the information, charging defendant with unlawfully obtaining "money" was not supported by proof that he obtained furs, and that there was a variance between the information and the proof. The court overruled the motion, and thereupon Garber testified in his own behalf in substance that on November 1, 1921, he was in the fur business in Chicago, and had been dealing with the firm of Canter & Angel, through Benjamin Angel, for a considerable time prior thereto; that when he purchased the furs in question he told Benjamin Angel that he was then short of money but expected to have money in the bank within a week, to which Angel replied that that would be all right as it would take a week for the $400 check to be returned from New York and presented at the bank; that thereupon he (Garber) signed the check and the note; and that thereafter on November 30th a petition in bankruptcy was filed against him. In rebuttal Benjamin Angel denied that at the time the furs were purchased Garber said anything about being short of money or that anything was said by either the witness or Garber as to the time the check, after being sent to New York, would reach Chicago and be presented to the bank for payment.

The bill of exceptions further discloses that at the conclusion of all the evidence Garber's attorney again called attention to the fact that the charge as made in the information was not sustained by the proof in several particulars, whereupon the attorney for the People asked, and was granted, leave to amend the information on its face to read that Garber obtained "personal property," instead of "money," by the giving of said check, but no further amendment was requested to be made, or was made, and such amendment as was actually made was not carefully

and completely made, for, while in one part of the information as amended it is charged that Garber, after the delivery of the check, obtained "personal property" of the value of $400 from Benjamin Angel, it is also charged that Garber at the time of giving the check well knew that he did not have sufficient funds on deposit in said bank or credit with said bank, - "all with the intent to cheat and defraud this affiant (i.e. Benjamin Angel, not Canter & Angel) of said sum of money."

Counsel for Garber contends in this court that the judgment should be reversed because of the above mentioned variance, and further contends in substance that the judgment in any event cannot stand because the People failed to prove the charge as laid in the information as amended, in that the charge is that Garber did the acts complained of with the intent to cheat and defraud Benjamin Angel, whereas the proof disclosed that the furs belonged to Canter & Angel and, if any unlawful intent existed in the mind of Garber, it was that of cheating and defrauding Canter & Angel, and not Benjamin Angel. We are of the opinion that counsel's last mentioned contention must be sustained under repeated decisions of our Supreme Court. In Lowell v. People, 229 Ill. 237, 237, it is said: "In criminal cases it is not sufficient, to sustain a conviction on a particular charge, to prove that the defendant was guilty of some other charge or of general bad and criminal conduct, but the proof must establish his guilt of the particular charge set forth in the indictment." (See, also, Sykes v. People, 132 Ill. 32, 48; People v. Bartman, 252 Ill. 561, 566; People v. Novotny, 305 Ill. 549, 557.) As said in the Novotny case, the question presented is not so much one of variance as of "failure of proof * * a fatal lack of evidence to prove the crime charged."

And in our opinion some of the testimony allowed to be given, over objection, by the witness, Nowzwski, tended to

prejudice the jury against Garber and was improper. While it may have been competent for the witness to testify that Garber's account with the bank was overdrawn on November 1, 1931, the witness should not have been allowed to testify that "our records show that he issued five other checks about this time," especially as it was not shown whether said checks, if issued, were honored or dishonored, or when they were issued, or when presented if presented.

For the reasons indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch, P. J., and Barnes, J., concur.

104 - 29192

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| CITY OF CHICAGO, Appellee, vs. WILLIAM JAMES, Appellant. | 236 I.A. 644 APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, William James, from a judgment of the Municipal court of Chicago, on a finding by the court that James was guilty of keeping a disorderly house in violation of section 2660 of the Municipal Code of the City of Chicago. The court imposed a fine of $100 and costs on the defendant.

The defendant had been previously tried for the same offense, and on that trial had been found not guilty and had been discharged. After the entry of the final judgment on the first trial the court vacated the judgment on motion of the city attorney, issued a new warrant for the defendant, tried the defendant again, and found him guilty. From the judgment on the finding on the second trial the defendant prosecuted this appeal. The action of the court in vacating the judgment on the first trial was based on a petition by the city attorney, in which it was stated that in finding the defendant not guilty and discharging him, the court was governed by an injunction which had been issued by the Superior court restraining and prohibiting the City of Chicago from interfering with the premises in question; that all of the provisions of the injunction were not before the court; that one of the provisions contained in the injunction, and which was not before the court, provided in substance as follows: "Nothing in the order shall in any way interfere with the enforcement of any and all laws of the City of Chicago, State of Illinois, or

United States Government, or in any way prevent said defendants from properly discharging their lawful duties in any lawful manner."

Counsel for the defendant contend that the second trial of the defendant constituted a second jeopardy for the same offense, in violation of the constitution.

In view of the fact that we are of the opinion that the evidence is insufficient to prove that the defendant was the keeper of a disorderly house, as alleged in the complaint, it will be unnecessary to consider the question of second jeopardy.

George Larson, the reputed owner of the alleged disorderly house, and Robert Hastings employed as a bellboy, were tried at the same time with the defendant. The court discharged Larson and Hastings.

In considering the question of the sufficiency of the evidence, we are of the opinion that the degree of proof applicable is proof beyond a reasonable doubt; and that that is so whether the proceeding should be considered a civil action to recover a penalty, as counsel for the City contend (City of Chicago v. Williams, 254 Ill., 360), or a quasi criminal prosecution, as counsel for the defendant contend (City of Chicago v. Kunowski, 303 Ill. 306). The complaint charges the defendant with having committed a criminal offense, and the rule is well established in Illinois that where, in civil actions, a criminal offense is charged in the pleadings, such offense must be proved beyond a reasonable doubt. Ag-Inturff v. Insurance Co. of N. A., 248 Ill. 92, 99; The People v. Sullivan, 218 Ill., 419, 437; Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 612; Grimes v. Hilliary, 150 Ill., 141, 146; Burciel v. Amiel, 218 Ill. App. 466, 468; Levi v. Costello, 214 Ill. App. 505, 511; Rudolph Stecher Brewing Co. v. Carr, 194 Ill. 32, 34.

In accordance with this rule in an action by the City to recover a penalty for the violation of a city ordinance in

keeping a place for the purpose of permitting persons to gamble, it was held explicitly in the case of City of Chicago v. Stone, 187 Ill. App. 90, 93, in an opinion delivered by Mr. Justice Duncan, that where a crime is charged in a complaint for the violation of an ordinance, the violation of the ordinance must be proved beyond a reasonable doubt; that "where no crime is charged in the complaint, the rule is that the ordinance must be proved, like any ordinary civil suit for the recovery of a penalty, by a clear preponderance of the evidence."

There can be no doubt that the offense charged in the complaint in the case at bar is a criminal offense, since section 2660 of the Municipal Code of the City of Chicago, which the defendant is charged with having violated, is substantially the same as section 57, Div. I, Chap. 38, of the Criminal Code of the State of Illinois. Section 2660 is as follows:

> "Every common, ill-governed or disorderly house, room or other premises kept for the encouragement of idleness, gaming, drinking, fornication, or other misbehavior, is hereby declared to be a public nuisance, and the keeper thereof or persons connected with the maintenance thereof and all other persons patronizing or frequenting the same shall be fined not exceeding $200.00 for each offense."

Section 57 is in part as follows:

> "Whoever keeps or maintains a house of ill fame or place for the practice of prostitution or lewdness, or whoever patronizes the same, or lets any house, room or other premises for any such purpose, or shall keep a common, ill governed and disorderly house, to the encouragement of idleness, gaming, drinking, fornication, or other misbehavior, shall be fined not exceeding two hundred dollars, or imprisoned in the county jail or house of correction for a period of not more than one year or both."

That the City recognized that the defendant was charged with a crime is shown by the fact that the City introduced evidence in regard to alleged statements made by guests of the hotel in the presence of the defendant, on the theory that such evidence was admissible under the rule in the case of The People v. Harrison,

261 Ill. 517. That case holds (p. 522) that "the principle on which statements made in the presence of a person accused of crime are received in evidence against him is that his silence, when he might, and naturally would deny statements imputing guilt to him if they were untrue, is regarded as an acquiescence in their truth and an implied admission of guilt."

The alleged disorderly house was a hotel. Two police officers went to the hotel about one o'clock in the morning. In the office of the hotel they found two colored men, one of whom was the defendant. According to one of the officers, the defendant told the officers that he was not the owner of the hotel but was the bellboy; that Larson was the owner of the hotel. The officers had no warrant for the arrest of any person in the hotel; they had not been detailed by a superior officer to make a special investigation of the hotel, and they were not acting pursuant to any complaint by an individual that the hotel was a disorderly house. The officers entered different rooms in the hotel and questioned the occupants of the rooms. They took the guests of one of the rooms, a man and a woman, into the presence of the defendant and Hastings, and questioned the guests. According to the officers the man admitted paying the defendant five dollars for the room, also admitted paying the woman five dollars, and the woman admitted receiving the money. Both the man and the woman testified on the trial and denied the testimony of the officers. The man testified that he paid five dollars for the room but did not know which one of the colored men he paid the money to. One of the officers testified that he asked the defendant in the presence of this couple if he had received five dollars for the room, also if he had asked the guests if they were married, and that the defendant did not answer. In his testimony on the trial the defendant denied that the officers questioned the guests as above stated, or that the guests made the answers

attributed to them. Two other guests, a man and a woman, were taken from their room into the presence of the defendant and Hastings and questioned by the officers. The testimony of the officers and the denials by the guests and the defendant were substantially the same as in the case of the first two guests. Before entering the hotel one of the officers arrested a couple, a man and a woman, about half a block away from the hotel and took this couple into the presence of the defendant and Hastings and questioned the couple. According to the officer the man said he paid the defendant five dollars for the room, gave the woman five dollars, and that the defendant furnished the woman. Neither the man nor the woman testified at the trial. The defendant denied the testimony of the officer. The other officer was also present when this couple were questioned, and he testified that he did not remember what the conversation was about; that he does not remember whether the defendant said anything or not.

The evidence shows that the couples who were questioned by the officers in the presence of the defendant and Hastings were not man and wife, but that they had registered as man and wife. There is no evidence to show that when they registered the defendant knew or had reason to believe that they were not man and wife. There is no evidence whether they had any baggage or not. There is no evidence to indicate that the defendant knowingly rented the rooms to them for immoral purposes. There is no evidence that the defendant ever before had rented any of the rooms in the hotel to anybody. There is no evidence in regard to the character of the hotel prior to the occasion in question. All of the evidence introduced by the City related only to the particular night in question.

The police officers did not testify to any acts person-

ally observed by them which would show that the defendant was the keeper of a disorderly house. The method adopted by the officers, as we have stated, was that of taking guests of the hotel into the presence of the defendant and questioning the guests. But the proof necessary to render the answers of the guests admissible was not made, for the reason that the officers did not testify whether the defendant denied the alleged statements of the guests, admitted the statements, or remained silent when the statements were made. The officers testified that the defendant refused to answer questions they put to him as to whether he had received five dollars from the guests, whether he had rented rooms to them, and whether he had asked them if they were married; but there is no evidence as to the attitude the defendant assumed toward the alleged statements of the guests. Whether he remained silent or whether he said anything when the guests made the alleged statements does not appear from the evidence.

It was held in the case of The People v. Mitti, 312 Ill., 73 (pp. 92, 93, 94) that "Of itself an admission is never sufficient to authorize a conviction;" that "it is not the law that everything asserted in the presence of the party and not denied by him is to be regarded as true, but the circumstance of silence is to be weighed by the jury as having a tendency, greater or less, according to its nature, to establish the fact stated by tacit admission;" that "if proof of silence under accusation is of itself sufficient to justify a conviction of crime, then the provision of the Criminal Code which denies to the prosecution the privilege of commenting upon the fact that a defendant has not testified, is not based on reason. The only sound reason for holding this character of evidence relevant is because it is the nature of innocence to be impatient of a charge of guilt whenever seriously

made and distinctly understood, and an innocent person will usually spontaneously deny the accusation and challenge immediate investigation of the charge."

On behalf of the defendant, Hastings testified that he, Hastings, was a bellboy in the hotel and had been for four and one-half years; that he was standing by the switchboard when the officers entered the hotel; that the clerk had taken sick; that the defendant reported the fact to the "boss" and that the defendant had charge until the "boss" got down. Hastings further testified that he was in the room with the defendant when the officers brought the different guests there, and that the guests did not make the statements that the officers testified they made; that the guests were only asked if they knew which one of the "boys" assigned them the rooms, and that the guests said they did not know.

The defendant testified in substance that he was a bellboy and told the officers that he was; that the desk clerk had been taken sick that night and had gone upstairs; that he, the defendant, notified the "boss, Mr. Larson," and that Larson told him to stay there until he came down; that he, the defendant, did not have charge of the hotel that night; that he told the officers that they were restrained from interfering with the hotel by the injunction which had been issued; that three couples came in, registered as man and wife, and asked for a room; that he had never seen any of them before; that he had no financial interest in the hotel; that Larson had instructed the clerk under no circumstances "to take anybody in unless they were man and wife," and "especially at night," as "the police would be trying to frame on him because he had an injunction;" that there were "quite a few permanent guests in the hotel that night."

An inspector of morals for the City of Chicago testified

on behalf of the defendant that he visited the hotel in the same way that he visited other hotels in Chicago; that no complaint was ever made to him against the character or reputation of the hotel; that he sometimes went to the hotel as often as once a month; that he went there mostly at night; that altogether he had been there about twenty times; that he never found any violations whatever that would warrant making a raid.

We are of the opinion from a consideration of all of the evidence that it has not been proved beyond a reasonable doubt that the defendant was the keeper of a disorderly house.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McBurely, P. J., and Matchett, J., concur.

174 - 29263

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| WILLIAM E. DRACKETT and R. O. STONE & COMPANY, a Corporation, Appellants, vs. GUY C. WOODIN, Appellee. | 236 I.A. 644<br>APPEAL FROM MUNICIPAL COURT OF CHICAGO. |

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiffs, William E. Drackett and R. O. Stone & Company, from a judgment in the Municipal court of Chicago, in favor of the defendant, Guy C. Woodin, in an action by the plaintiffs to recover commissions alleged to have been earned by the plaintiffs for procuring a purchaser for the farm of Woodin. The negotiations for the sale of the farm were conducted by Drackett.

The only question in the case is one of fact, namely, whether Drackett was the procuring cause of the sale of the farm. The sale was not consummated by Drackett, but by another agent. It is contended, however, that Drackett was the procuring cause of the sale. If the preponderance of the evidence shows that he was the procuring cause, and that there was a joint contract between the plaintiffs and Woodin, then the plaintiffs would be entitled to recover commissions.

Drackett was a real estate salesman in the city of Chicago, associated with R. O. Stone & Company. Woodin was a resident of the city of Chicago and the owner of a farm situated near Chicago. Drackett and Woodin had known each other for several years. In June, 1922, Woodin had a conversation with Drackett in which he told Drackett that his health was bad; that he intended to go to California for the winter and possibly might

live there; that he wanted to sell his farm; that he had given John Griffith exclusive power of sale of the farm, but that he wanted Drackett to handle this matter of the sale of the farm. Drackett said he would not consider the proposition unless Woodin revoked Griffith's power of sale and gave him, Drackett, exclusive power of sale. Woodin revoked Griffith's power of sale and gave Drackett the exclusive right to sell the farm. The farm consisted of 320 acres and the price was fixed at $500 an acre. Woodin suggested to Drackett the names of several persons as prospective purchasers. Among the names mentioned was that of a friend of Woodin named Stein. The first name of Stein was Benjamin. He had a brother named Monte. Drackett first began negotiations with Monte for the sale of the farm. Subsequently, after Drackett learned of his mistake, he took up the matter of the sale of the farm with Benjamin. Woodin and Benjamin Stein had known each other intimately for several years. They were both members of the Chicago Equestrienne Association, which gave frequent musicales at the Dexter Park Pavilion at the Stockyards, and Woodin and Drackett would meet at these musicales. On one of these occasions, in a conversation with Woodin, Benjamin Stein expressed a desire to have a farm like Woodin's. Woodin said, "You can buy mine," although Woodin at the time was not trying to sell his farm. This conversation took place prior to the time that Woodin gave Drackett the exclusive right to sell the farm. After Drackett had been authorized by Woodin to sell the farm, Drackett went out to the farm and took some pictures of it. Woodin left for California in the winter of 1922. Up to this time Drackett had not seen Benjamin Stein. Drackett had tried to get in communication with Monte Stein in the fall of 1922, but had been told that Monte Stein was in Europe. When Monte Stein returned Drackett had a

conversation with him about the middle or latter part of March, 1923, and was informed by Monte Stein that he did not want to buy a farm, that Brackett should see his brother Benjamin. Brackett testified that he immediately wrote a letter to Benjamin Stein in reference to the sale of the farm. Woodin returned from California March 27, 1923. He testified that immediately after his return from California he had a conversation in his office with Brackett, in which Brackett stated that Monte Stein did not want to buy the farm; that he, Woodin, said "No one told you Monte Stein was in the market. I told you his brother Benjamin;" that Brackett said, "I will go right over and talk to Benjamin."

Woodin's secretary, Miss Greenshields, testified that she heard the conversation in question. According to her testimony, it took place after April 1, 1923. But whether Brackett got in communication with Benjamin Stein before or after this conversation Brackett had with Woodin, Brackett had not approached Benjamin Stein in regard to the sale of the farm while Woodin was in California; and according to Brackett's own testimony he had not seen Benjamin Stein until about the middle or latter part of March, 1923. The testimony is conflicting as to what reports, if any, Brackett made to Woodin in regard to Brackett's negotiations with Benjamin Stein after Brackett discovered his mistake in regard to Monte Stein.

Woodin testified that he did not recall that Brackett ever reported to him any interview Brackett had with Benjamin Stein after the conversation in reference to Monte Stein. The testimony of Benjamin Stein was to the effect that Brackett had offered the farm to him for approximately $160,000; that he told Brackett the price was too high; that he was not "in the market for that farm at that price;" that he never made an offer of any kind to

Drackett for the farm. Drackett admitted in his testimony that Benjamin Stein "never made me a proposition to buy this farm at any price." Drackett testified that Benjamin Stein said he did not want to buy the farm at the price offered to him; that the price was "over his head;" that Benjamin Stein said he would like to rent the farm for two or three years with an option to buy; that he, Drackett, submitted this proposition to Woodin; that Woodin refused it and said he wanted only to sell the farm; that he, Drackett, saw Benjamin Stein again and that Benjamin Stein offered to buy part of the farm; that he, Drackett, submitted this proposition to Woodin; that Woodin said he would not consider the sale of part of the farm, that he wanted to sell the whole farm. According to Drackett's testimony these negotiations with Benjamin Stein were had before April 4, 1923. On that date Woodin wrote a letter to Drackett withdrawing from Drackett the exclusive right to sell the farm. The letter is as follows:

"Dear Mr. Drackett:
After this date, it will be necessary for me to withdraw my proposition to you with reference to sale of Woodin Farms.
I cannot give you the exclusive sale of this place after this date.
Also, there has been nothing definite about commission. One agent has agreed in case he sells this farm to take three per cent commission.
Would you also be willing to do this?
Yours very truly,
(Signed) S. G. Woodin, B. S."

Up to this time the matter of Drackett's commission had not been mentioned by him or Woodin. Drackett answered this letter of April 4, 1923, as follows:

"I am in receipt of your letter of April 4, revoking the exclusive which I have had on your farm at Lake Forest. I regret that you have seen fit to do this, but nevertheless will put forth the same efforts to dispose of the property, and will be more than glad to work with you in any connection that may arise.
I note what you say about commission. While the regular charge of commission on this character of property

is 5% still I have never had in mind that I was going to charge you more than 3% commission, and in case we succeeded in doing anything with the farm, this will be the amount of my commission.

Thanking you for your consideration in the past, and hoping we may be able to do something with the property, we beg to remain,

Yours very truly,
S. O. Stone and Company,
Per W. E. Drackett."

Drackett testified that after he received the letter of April 4, 1923, withdrawing the exclusive right of sale from him, he saw Woodin and that Woodin said, "You can work on it just the same as you have been but I want it in the hands of others so that they can work as well, because I want to sell the farm;" that he, Drackett, saw Benjamin Stein about the middle of April, 1923, and that Stein said he would like to go to the farm and spend a week or ten days there; that he, Drackett, reported this conversation to Woodin; that Woodin said that Stein was "a logical buyer" of the farm, and that he, Woodin, would arrange for him to go to the farm for a few days; but that the farm was in bad shape and that he, Woodin, wanted to fix it up before Stein went there; that he, Drackett, saw Woodin every "little while" until he received a letter from Woodin on May 3, 1923, which revoked and withdrew entirely from Drackett the power to sell the farm. This letter is as follows:

"In order to avoid any complications, I am going to withdraw the sale of my farm from your hands and from every other agent, except one. I hate to do this, but as I told you when I returned from California, I am going to work fast and dispose of this farm. It has been ten days or two weeks since I heard a word from you and, as I say, I must get results and am going to place this in one agent's hands."

Drackett testified that when he received this letter he went to see Woodin and complained of the way he was being treated; that Woodin replied that he was determined to sell the farm and had given the exclusive right to someone else to sell it. Subsequently Woodin, through a man named May, conducted

negotiations with Stein for the sale of the farm, but no sale was effected. May suggested to Woodin that a member of May's firm named Hefter, an old friend of Benjamin Stein, be permitted to carry on the negotiations with Stein. Woodin agreed to this and a sale of the property to Stein was finally consummated on June 17, 1923, through Hefter. The price paid by Stein was $75,000.

We are clearly of the opinion that Brackett was not the procuring cause of the sale, and that assuming for the sake of argument that there was a joint contract between the plaintiffs and Woodin, the plaintiffs are not entitled to recover any commissions. In order to recover commissions the plaintiffs would have to show by a preponderance of the evidence that Brackett commenced negotiations for a sale of the farm to Benjamin Stein and was prevented from consummating the sale by the fraud, procurement, misconduct or fault of Woodin. Balding v. Nonneberry, 191 Ill. App. 368, 372. We do not think that the plaintiffs have made such proof. Brackett's negotiations with Benjamin Stein were unsuccessful because Stein was unwilling to pay the price proposed. The evidence does not show that the negotiations which were begun by Brackett with Benjamin Stein were subsequently carried on by Hefter. On the contrary, the evidence shows that Brackett's negotiations with Benjamin Stein were terminated by Woodin; and that an entirely new proposal was made to Stein by Hefter. Moreover, Stein was not selected by Brackett as a prospective purchaser in the first instance. Stein's name was given to Brackett by Woodin as a prospective purchaser.

The statement of claim alleges that the plaintiffs are entitled to a commission of 3 per cent for procuring Benjamin Stein as a purchaser of the defendant's farm at the purchase

price of $135,000. Yet Drackett admitted in his testimony that Benjamin Stein never made a proposition to him to buy the farm at $135,000 nor at any price. The evidence shows that Benjamin Stein refused to purchase the farm on the terms proposed by Drackett, and that Stein subsequently purchased the farm through the agency of Hefter for $75,000.

Counsel for the defendant maintain that the plaintiffs are not entitled to sue jointly, as the evidence does not show that there was a contract of employment with the plaintiffs jointly; that the defendant contracted only with Drackett.

In view of the fact that we do not think Drackett was the procuring cause of the sale, it will be unnecessary to decide whether the contract for the sale of the property was made with Drackett individually, or jointly with Drackett and H. O. Stone & Company.

For the reasons stated the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Hatchett, J., concur.

97 - 29536

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

PHILIP DAVIS,
Plaintiff in Error.

236 I.A. 644

APPEAL FROM CRIMINAL COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by the defendant, Philip Davis, from a judgment in the Criminal court of Cook County on the verdict of a jury finding the defendant guilty of assaulting Jacob Wellrauch with a deadly weapon. The defendant was sentenced to serve a term of 90 days in the House of Correction and to pay a fine of $25.

A reversal of the judgment is asked by the defendant on the ground that the verdict is not warranted by the evidence; and that the evidence does not show that the defendant used a deadly weapon.

The testimony on behalf of the People shows, in substance, that Wellrauch worked as a presser at the Francine Frock Company; that he knew the defendant; that Wellrauch first saw the defendant when Wellrauch was asked to join a local union of which the defendant was chairman; that during a strike the defendant was outside the shop as a picket; that the defendant met Wellrauch and asked him if he was going to strike; that Wellrauch said there was no strike; that the defendant said, "Don't go to work, there is a strike. If you go to work you will be sorry;" that Wellrauch did go to work; that about two weeks later, namely, March 25, 1924, the defendant stood by a building near Wellrauch's home; that the defendant whistled and some other man came out; that one of the men by the name of Stein, whom the prosecuting witness identified

in court, hit Wollrauch with a brick; that the defendant struck Wollrauch with a large pipe; that a machine was standing near by; that Wollrauch cried out, and the men drove away in the machine; that Wollrauch's eye was cut open, his nose was broken, and he was laid up for twelve days.

On behalf of the defendant the testimony showed substantially that the defendant was chairman of one of the local branches of the union of garment workers; that the defendant did not know Wollrauch and had never seen him before the day Wollrauch testified on the present trial; that the defendant did not know Stein, the man that Wollrauch identified as one of the assailants with the defendant; that the defendant went on a strike when one of the shops where he worked went on a strike; that the defendant did not hit Wollrauch with a pipe, brick, or any other instrument; that on the night of March 25, 1924, the defendant was at home.

It will be observed that the evidence is conflicting. In such state of the record it was the special province of the jury to determine the truth of the case. The People v. Martin, 304 Ill. 494, 501; People v. Boucher, 303 Ill., 375, 380.

We do not think that the verdict is contrary to the weight of the evidence.

In regard to the question as to what constitutes a deadly weapon, the rule is that it is a weapon "likley to produce death or great bodily harm by the use made of it." McKary v. The People, 32 Ill. App. 58, 62. In the case of Hamilton et al. v. The People, 113 Ill., 34, it was held (p. 38) that "a hoe, both in popular and legal signification is per se a deadly weapon fully as much so as a loaded pistol or an ax."

We are of the opinion that on the record in the case at bar the "large pipe" may be considered to be a deadly weapon.

For the reasons stated the judgment is affirmed.

McSurely, P. J., and Matchett, J., concur. JUDGMENT AFFIRMED.

4 - 38668

CAROLYN MAC DONALD, as Administratrix of the Estate of Aeneas Mac Donald, Deceased,

Defendant in Error,

v.

WILLIAM HEPTIG,

Plaintiff in Error.

236 I.A. 644

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Feb. 11, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover for the wrongful death of Aeneas Mac Donald, claiming that he had been killed through the negligence of the defendant. There was a verdict and judgment in plaintiff's favor for $10,000.00 and the defendant appeals.

The record discloses that on May 28, 1920, at about 11:30 o'clock at night, the deceased, a man who was about 63 years old, after alighting from an eastbound street car in 67th street at the intersection of that street with Blackstone avenue, a north and south street, was walking in a northeasterly direction, and as he reached about the middle of the north or westbound street car track in 67th street, he was struck and killed by an automobile which was being driven by thedefendant west in 67th street.

The defendant contends that there are two reasons why the judgment should be reversed. First, that the court erred in failing to direct a verdict in his favor at the close

Opinion filed Feb. 11, 1926.

of all the evidence on the ground that the evidence disclosed that the deceased was guilty of contributory negligence;and, Second, that the verdict is excessive.

First. This point is rather elaborately argued and a number of authorities are cited which counsel for the defendant contends sustains his contention that the court should have directed a verdict in defendant's favor at the close of all the evidence, since the evidence discloses that the deceased would not have been injured had he not been guilty of negligence. We have carefully considered all of the evidence in the record on this point, and we are clearly of the opinion that the question whether the deceased was guilty of contributory negligence, was a proper one for the jury, and, therefore, the motion for a directed verdict was properly denied. The question of contributory negligence in cases such as the one at bar, is generally a question of fact for the jury and only becomes a question of law for the court when the evidence is so clearly insufficient to establish due care on the part of the deceased that all reasonable minds would reach the conclusion that the deceased was guilty of negligence. Dukeman v. C., C., C. & St. L. R.R. Co., 237 Ill. 104.

Since there must be a new trial, we will avoid discussing the evidence, except in a general way, so as to show the reason for our decision.

The evidence tends to show that about 11:30 o'clock at night, the deceased was a passenger on an eastbound street car in 67th street; that the car stopped at the west side of Blackstone avenue, a north and south street to permit the de-

of all the evidence on the ground that the criminal claims that the homicide was guilty of manslaughter only, provided, that the verdict is invalid.

Held. That plaintiff is entitled declaratory judgment and a remedy of mandamus was taken with notice to the defendant and accepted jurisdiction in question. That the jury should have directed a verdict in accordance with law in the light of all the evidence, since the criminal defendant had the demand would not have been liable for the act-time period of negligence. In view of the fact that the defendant in the trial on this ground, the verdict of the jury exactly of the course that the criminal defendant was guilty of some intentional misconduct, and a verdict was for the jury, and therefore, the action for a wrongful death was properly denied. The question of contributory negligence is even such as the one at bar, is ordinarily a question of fact for the jury but only between a question of law for the court when the evidence is so clearly insufficient to establish the fact on the part of the defendant that all reasonable minds would reach the conclusion that the defendant was guilty of negligence. Kennedy v. Illinois Cent. R. Co., 222 Ill. 124.

Where there must be a new trial, we will avoid commenting on evidence, except in a general way, so as to show the issues for our decision.

The evidence shows that the car that struck plaintiff's intestate, the decedent was a passenger on an railroad train and in this action, this the and employee of the said line of railroad company, a suit for wrongful death against the de-

ceased and other passengers to alight. After the passengers were discharged, the car started up and the deceased and at least one of the other passengers started in an northeasterly direction to cross over 67th street, and when the deceased had reached a point about the center of the westbound street car track, he was struck by defendant's automobile, thrown to the pavement and, as a result, died shortly thereafter. Witnesses for the plaintiff testified that the automobile was traveling at about 35 miles per hour, while witnesses for the defendant gave testimony to the effect that it was not going faster than from 15 to 20 miles per hour. As to how far the street car had proceeded before the deceased was struck and the point where the street car had reached when passed by the automobile, the evidence, as is usual in such cases, is conflicting. Some of the witnesses testified that the street car was about at the east side of Blackstone avenue and others place it nearly half a block east of that street. The testimony all shows that the horn on the automobile was not sounded and there is no contention made that the defendant was not negligent, but the only claim made by the defendant is that the deceased was also negligent, and that without the negligence of the deceased, he would not have been injured. Taking all the evidence into consideration, we are clearly of the opinion that all reasonable minds would not reach the conclusion that the deceased was not in the exercise of due care upon the occasion of this unfortunate accident. In these circumstances, the question was one for the jury.

Second. The defendant contends that the verdict is excessive, but in this respect the defendant makes little or no argument on the amount of the verdict and judgment, but con-

tends that the court erred in the admission of evidence in that William B. Mac Donald, a son of the deceased, who was 31 years of age, was permitted over objection, to testify that he was a cripple and had lost both legs and consequently was unable to do manual work. The witness was also permitted to testify that his foot and leg became infected so that amputation was necessary. This evidence was clearly inadmissible and prejudicial. C.P.& St. L. R. R. Co. v. Woolridge, 174 Ill. 330. In that case it was held reversibly erroneous to permit a son of the deceased to testify that he was a cripple and unable to work. The court there said (p.333) "That such evidence would have a very strong tendency to enlist the sympathy of the jury and thereby tend to effect not only the amount of the verdict, but also to effect the judgment of the jurors as to a liability, is very clear. This evidence was admitted on the theory that, under the law, this crippled son was in need of help on account of his helpless condition, and therefore, had been supported, and was legally entitled to be supported by his father because of such condition." Under the law in this state, it is not competent to show the pecuniary circumstances of the widow, family or next of kin of the deceased at the time of his death or their crippled condition or poor health, yet it is competent to show that the wife, children or next of kin were dependent upon him for support before and at the time of the deceased's death. Preble v. Wabash R. R. Co., 243 Ill. 340; P.C.C. & St. L. Ry. Co. v. Kinnare, 203 Ill.388; Brennen v. Carterville Coal Co., 241 Ill. 610; Pennsylvania Co. v. Keane, 143 Ill. 172; St. L. ,P.& N. Ry. Co. v. Dorsey, 189 Ill. 251.

In the Kinnare case the court said, (p.391): "The deceased left a widow and nine children and the widow was allowed to testify that he contributed his wages every month to the support of the family. It is not proper to admit evidence of the pecuniary condition and resources of the widow or next of kin or their unfortunate condition, but it is not error to allow the proof of the earnings of the deceased and that the wife and children were supported by him."

In the Dorsey case, the court said: (p.254) "The contention of appellant that it was error to permit the widow to testify that she was supported by the deceased, her husband, is fully answered by the cases of Chicago and Alton Railroad Co. v. May, 108 Ill. 288; Pennsylvania Co. v. Keane, 143 id. 173, and Swift & Co. v. Foster, 153 id. 50. The case of Chicago, Peoria and St. Louis Railroad Co. v. Woolridge, 174 Ill. 330, does not conflict with or purport to overrule these cases. There was no attempt in this case to show the poverty, helplessness or dependence of the widow, but merely show that she was supported by her husband, which was clearly not improper in view of the foregoing decisions."

Under the authorities cited the admission of the testimony of this witness, over objection, was prejudicial and erroneous. Counsel for plaintiff admits that under the Woolridge case, the testimony of this witness was inadmissible, but stated that since that opinion was rendered, the bar and the courts of this state are waiting for the Supreme Court to reverse the holding it there made, and that the holding in that case is unsound and should not be followed by us. This is a novel argument to make. Of course, it is our duty to

follow the law as announced by our Supreme Court.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON AND TAYLOR, JJ. CONCUR.

ESS - 39017

OLGA ZUFELT,

Appellee,

v.

A. M. ANDREWS INVESTMENT CORPORATION, et al,

Appellants.

236 I.A. 645

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Feb. 11, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of fraud and deceit against Andrews & Company, a corporation and A. M. Andrews Investment Company and others, to recover damages claimed to have been sustained by her by reason of false representations as to the value of certain stock purchased by her from them. The case was tried before a judge and a jury and there was a verdict in favor of the plaintiff and against the two defendants named for $4,000.00, the other defendants being eliminated. The court ordered a remittitur of $1,000.00, entered judgment in favor of the plaintiff for $3,000.00 and the defendants appeal.

The record discloses that during the years 1916 and 1917, the defendants, whose place of business was located in Chicago, were engaged in the selling of stock and that in November, 1916, and January and March, 1917, they sold plaintiff stock of the Falls Motor Company and the Empire

Opinion filed Feb. 11, 1986.

Tire & Rubber Company for which she paid them $5,056.00. She bought the stocks at the following prices: 3 shares Empire Preferred at $94.00, 30 shares Empire Preferred at $100.00, 12 shares Empire Common at $4.50, 120 shares Empire Common at $3.00, 13 shares Falls preferred at $100.00, and 12 shares Falls Common at $5.00. Plaintiff who lived at Sheboygan, Wisconsin with her husband, claimed that the defendants had fraudulently misrepresented to her that the stock which she purchased was worth what she paid for it, and that the prices she paid were the prevailing market prices at the time she made the purchases; that afterwards she discovered that the representations were false; that the stock was selling for about one-half of what she paid for it, and that the assets of the Motor Company and the Tire Company were not at all as represented by the defendants.

On the trial, plaintiff produced a number of witnesses who gave evidence to support her version of the matter and a great deal of correspondence and circular letters from the defendants were also introduced in evidence by plaintiff. The defendants did not call any witnesses, but only offered a number of letters passing between parties.

1. The defendants contend that the evidence fails to show that they made any false representations in reference to the value of thestock as to the price at which it was selling; that the most that can be said is that the evidence merely tended to show that what the defendants did in the way of representing the stock, were "mere expressions of opinion or puffing." We think this contention is not borne out by

the evidence, but are of the opinion that the letters sent by the defendants to plaintiff and the other information given to her were in the nature of statements of fact made by the defendants as to the value and selling price of the stock and were made for the purpose of inducing her to act upon them, so that she would buy the stock. The evidence tends to show that the defendants advised the plaintiff that the stock was worth par and that it was selling for that price. It further tends to show that they made statements of fact in reference to the book value, the earning power, and the production of the two companies, the stock of which was sold by the defendants to plaintiff. It further appears from the evidence that the defendants represented to plaintiff that certain auditors had made an audit of the assets and liabilities of the two companies and sent to her what they stated was a statement showing the assets and liabilities of the two companies. These statements which plaintiff received and which she testified she relied upon were different from the report of the auditors made for the defendants in a number of particulars. The report of the auditors made to the defendants, and which was produced by them on the trial in response to the subpoena duces tecum, among other things, showed that the Empire Tire and Rubber Company had cash in the bank on August 31, 1916 of $82,391.73, while the statement of assets and liabilities of this company which was sent by the defendants to plaintiff showed that on August 31, 1916, the defendants had in the bank $577,765.83. No explanation was made by the defendants on the trial and none is made in this court as to this discrepancy. The report as shown by the balance sheet sent to the plaintiff showed total assets of the

Empire Company of $5,605,477.69, while the report of the auditors showed the assets to be but $2,350,988.16. The report of the auditors of August 31, 1916, for the Falls Motor Company showed the net book value to be $357,812.87, against which there was outstanding stock of the par value of $1,500,000.00. This report also showed that company had on hand $200.00 in cash; that its patents and good will were carried at $956,506.68; that there was an overdraft at the bank of $3,159.19, and notes payable of $50,000.00. On September 8, 1916, the defendants sent out a circular letter, one of them being received by plaintiff, in reference to the Falls Company, wherein they stated that that company had no bonds, notes or other floating indebtedness. The report of the auditors made to the defendants for the months of July and August, 1916, showed that the Falls Company had paid interest during those months to various holders of notes in the amount of $5,079.35. The balance sheet of that date made by the auditors, also showed that the company owed noted for $50,000.00. On November 9, 1916, the defendants wrote a letter to plaintiff's husband at Sheboygan, who was selling stock for the defendants and who sold the stock to plaintiff which she purchased from the defendants, giving the number of motors produced, and theprofits which the company was earning. The evidence further discloses that the defendants wrote letters which were received by the plaintiff, advising her that the stock in the two companies had a book value equal to the par value of the stock, and that the stock was selling at par and further to the effect that plaintiff was paying the market price of the stock. Two witnesses, who were employed by stock brokers, who were conducting a stock brokerage busi-

Insurance Company of $[illegible],000,000.00, while the report of the auditors showed the assets to be not $[illegible],000,000.00. The report of the auditors of August 31, 1928, for the Falls Auto Company showed the net book value to be $[illegible], against which there was outstanding stock at the par value of $[illegible],000,000.00. This report also showed that company had on hand $[illegible],000.00 in cash, that its assets and good will were valued at $[illegible],000.00; that there was an overdraft at the bank of $[illegible], and notes payable of $[illegible],000.00. On September 8, 1928, the defendants sent out a circular letter, one of them being received by plaintiff, in reference to the Falls Company, wherein they stated that that company had no bonds, notes or other floating indebtedness. The report of the auditors made to the directors for the months of July and August, 1928, showed that the Falls Company had paid interest during those months to various holders of notes in the amount of $[illegible],000.00. The balance sheet of that date made by the auditors, also showed that the company paid notes for $[illegible]. On November 8, 1928, the defendants wrote a letter to plaintiff's husband at Hobart, who was calling about the Falls Company and who had the stock to identify which had been received from the defendants, giving the number of motors purchased, and inquiring which the company was dealing. The defendants further at about this time the defendant's report showed [illegible] by the plaintiff, substantiated that the stock in the two companies had a book value equal to the par value of the stock, and that the plaintiff was relying on and was induced to the effect that plaintiff was paying the actual value of the stock. The statements, was made [illegible] by some business, who was considering a stock brokerage business

ness in Chicago, testified that they had made sales of these two stocks, both common and preferred, and the price testified to by one of the stock salesman, Blanchard, was Falls Preferred $45.50 per share and the Common at $3.00 per share; that the Empire Preferred sold at $45.00 per share and the Common at $3.00 per share. He further testified that most of these sales were made to Andrews & Company, one of the defendants. The other stock salesman, Sardy, testified that the Falls Preferred sold at $42.50 to $47.00 and the Common at $2.50 to $3.00 per share; that the Empire Preferred was sold at $45.00 to $55.00 per share and the Common at $3.00 to $4.00 per share.

George E. Brill, a witness called on behalf of the complainant, testified that at the time in question, he was employed by the defendants and sold the preferred stock at $100.00 per share and the common at $10.00 per share and that he made these sales on behalf of the defendants to the public generally.

The defendants contend that the sales as testified to by the witnesses, Blanchard and Sardy, is of no value, because they testified they sold to other brokers and not to the public in general, while the witness Brill testified that he sold the stock at par to the general public. We think the contention is unsound. The testimony given by the two stock brokers as to the prices at which they sold these stocks was competent evidence of the market value of those stocks. Where a defendant is charged with having defrauded the plaintiff in selling the latter stocks at prices mater-

much in things, testified that they had such price of these stocks, both common and preferred, and the price ranging from [illegible] to [illegible] [illegible]. [illegible] as high preferred $[illegible].00 per share and the common at $[illegible].00 per share; that the Dayton "Preferred sold at $[illegible].00 per share and the common at $[illegible].00 per share. He further testified that many of these sales were made to Andrews & Company, one of the defendants. The other stock witness, Hardy, testified that the Delta Preferred sold at $[illegible].00 to $[illegible].00 and the common at $[illegible].00 to $[illegible].00 per share; that the Dayton Preferred was sold at $[illegible].00 to $[illegible].00 per share and the common at $[illegible].00 to $[illegible].00 per share.

George E. Zeilly, a witness called on behalf of the defendants, testified that at the time in question, he was employed by the defendants and sold the preferred stock at $[illegible].00 per share and at a common at $[illegible].00 per share and that he made these sales on behalf of the defendants to the public generally.

The defendants contend that the value as testified to by the witnesses, Hardy and Zeilly, is of no value, because they testified they sold to other brokers and not to the public in general, while the witness Duff testified that he sold the stock at par to the general public. We think the contention is unsound. The testimony given by the two stock brokers as to the prices at which they sold these stocks was competent evidence of the market value of these stocks. There is a difference in charged with having [illegible] the plaintiff in selling the latter stocks at prices substan-

ially in excess of their value and of their market price, the defendant does not disprove that charge by showing that he succeeded in selling the same stocks to some one else at the same prices paid by the plaintiff. In any event the question was one for the jury and there is no complaint that they were improperly instructed. Upon a consideration of all the evidence in the record, we are clearly of the opinion that we would not be warranted in disturbing the verdict of the jury, and we are also of the opinion that the contention made by the defendants to the effect that the evidence fails to prove scienter is untenable. The evidence tends to show that the defendants knew from the reports made to them by the auditors that the assets and liabilities of the company were not what the defendant represented them to be to the plaintiff. It further tends to show that the stock was not selling at par and that the defendants knew of this fact, because they were buying it themselves.

3. The defendants further contend that the evidence discloses that plaintiff's husband, who sold the stock to her did not rely upon the information he received from them, but that it shows that he lived in Sheboygan, knew the affairs of the Fall Motor Company and obtained information from them, which information was acted upon by plaintiff in the purchase of the stock. The evidence does tend to show that plaintiff's husband knew some of the officers of the Motor Company, whose plant was located near Sheboygan, and that he obtained some information about the affairs of that Company from the officers and from other persons at Sheboygan, but it was not such information as would give one

fully in excess of their value and of their market price.

The defendant does not disprove that charge by showing that he succeeded in selling the same stocks to some one else at the same prices paid by the plaintiff. In any event the questions can not for the jury and there is no complaint that they were improperly instructed. Upon a consideration of all the evidence in the record, we are clearly of the opinion that we would not be warranted in disturbing the verdict of the jury, and we see also of the opinion that the exception made by the defendants to the effect that the evidence fails to prove <u>guaranty</u> is untenable. The evidence tends to show that the defendants knew from the reports made to them by the auditors that the assets and liabilities of the company were not what the defendants represented them to be to the plaintiff. It further tends to show that the great was not selling his pay and that the defendants knew of this fact, because they were buying to themselves.

2. The defendants in further contend that the evidence disclosed that plaintiff's husband, who said the stock to her did not rely upon the information he received from them, but that likewise that he acted in reliance, when the defendants offer "Exhibit [illegible]" [illegible] (Exhibit [illegible]) not (good) [illegible] in evidence in the numbers of the record. The evidence has tended show that plaintiff's husband knew some of the efficiency of the Motor Company, where plant was located, who the officers and that he obtained some information about the affairs of that Company from the officers and from other persons at Binghamton, but it was not such information as would give one

any accurate knowledge as to the financial standing of the Company, and we think it appears from the evidence that plaintiff relied upon the information furnished by the defendants to her.

Finding no substantial error in the record, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

375 - 23033

ETHEL FRANKLIN,

Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corp.,

Appellant.

236 I.A. 645

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Feb. 11, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover $196.00, which she claimed was due her under two policies of insurance issued by the defendant. There was a verdict and judgment in her favor for the amount she claimed and the defendant appeals.

The record discloses that on July 5, 1920, the defendant executed and delivered to plaintiff its policy of insurance, the maximum amount payable under the policy being $245.00; that afterwards on February 14, 1921, it executed and delivered to plaintiff another policy of insurance in the maximum sum of $147.00. Both policies provided that if while they were in effect, the assured should "lose permanently the sight of both eyes, total and permanent disability will be deemed to exist, and one-half of the amount of insurance then payable in the event of death shall be payable immediately upon receipt by the Company of due proof of such loss and surrender of this policy."

Opinion filed Feb. 11, 1926.

Plaintiff claimed that one-half of the amount named in each policy was due, because on or about March 1, 1922, she had permanently lost the sight of both eyes, and that she had given all necessary notices required by the policies, demanding payment, but the defendant denied liability.

Defendant filed a long affidavit of merits, which set up a great many defenses to the effect that plaintiff at the time she applied for insurance, stated she did not have consumption and a number of other serious diseases, and that such statements were untrue. There was no attempt on the trial to prove that plaintiff was afflicted with any such diseases. The defense made was that plaintiff was not in "sound health" at the time she applied for insurance, contrary to the statement made by her in her application; that she represented that she had not taken treatment in a hospital or dispensary, which was also untrue, because the evidence showed that plaintiff was blind at the time she applied for insurance.

The evidence shows that plaintiff had lived at Nashville, Tenn. and had taught school, although her application for insurance was signed by her mark. Counsel for the defendant in their brief, after commenting on the fact that the application was signed by her mark, stated "the question then is, why did she sign these applications with her mark?" It would seem that this was a very pertinent question to be asked upon the trial, but the plaintiff was not asked any such question.

Plaintiff testified that she had received treatment at the Vanderbilt Hospital, in Nashville in the year 1914,

where she remained for a few days, but that she had not been treated since that time until shortly after she lost her eye sight in March, 1922. The depositions of plaintiff's mother and daughter, who both lived in Nashville, Tenn. were taken by the defendant, and their testimony is to the effect that plaintiff had had trouble with her eyes when she lived at Nashville, and plaintiff's daughter testified that her mother had been stone blind since 1912.

The defendant on the trial had a court reporter read testimony given by Doctor Starr, which was apparently given on a former trial. The matter is most unsatisfactory and it is very difficult to understand what was sought to be proved, but it seems that plaintiff had been a patient at the Cook County Hospital, and had been treated professionally by Doctor Starr, who was an interne at that institution at the time. He had a hospital sheet on the trial, part of which was made by himself. Several pages of this appear in the record. Whether it was offered or not, is uncertain. The court, however, held that it was inadmissible and could only be used to refresh the witness' recollection, andsince it did not refresh the witness' recollection, no use could be made of it. No point is made in this respect, but since there must be a new trial, we think we ought to say that upon a re-trial of the case, if it appears that the doctor can testify that he made the history sheets or part of them, at or about the time he treated plaintiff, and that the records, whether made by him or somebody else, were recorded at or about the time of the treatments and are true, all of them or such parts as he is thus able to ver-

ify are admissible in evidence, although an examination of them by him does not refresh his recollection. We gave this question very careful consideration in the case of Koch v. Pearson, 219 Ill. App. 468, where the authorities are considered and such evidence held admissible.

Plaintiff in rebuttal denied that she was blind when she lived at Nashville, but testified that she lost her eye sight in 1922 in Chicago. Another witness testified in her behalf tending to show that plaintiff was not blind prior to March, 1922.

The court instructed the jury that since it appeared that plaintiff was examined by a physician representing the Company, prior to the issuance of the policy, and that an agent of the Company solicited her insurance, If she were blind at that time, it must be that both the doctor and the agent knew it, and that if they did know it, their knowledge was the knowledge of the Company, and the Company would be liable. Objection was made to this instruction by counsel for the defendant and the objection we think should have been sustained, because if there was fraud and collusion between plaintiff, the agent and the doctor who saw her in reference to her application for insurance, the knowledge of the agent and doctor in these circumstances cannot be imputed to the company, because where an agent is engaged in defrauding his principal, he will not be presumed to have communicated the information. Rockford Insurance Co. v. Nelson, 65 Ill. 415.

For the error in giving the instruction, the judg-

ment of the Municipal Court of Chicago is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, J. AND TAYLOR, J. CONCUR.

384 - 29042

EDWARD BERNDS and WILL J. BELL,
Trustee,

Appellees,

v.

NATHAN K. ARANOFF,

Appellant.

236 I.A. 615

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Feb. 11, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

On April 19, 1920, Edward Bernds and Will J. Bell, Trustee, filed their bill to foreclose a trust deed given to secure an indebtedness of $4,000.00. The note and trust deed were dated November 12, 1912, and the indebtedness was due five years after date. The time of payment was extended five years and became due as extended, November 12, 1922. The sole default alleged in the bill was the alleged failure of Aranoff to produre fire insurance on the premises in accordance with the terms of the trust deed. Complainants contending that they had the right to declare the entire debt due by reason of such failure. The bill also alleged the insolvency of the maker of the note. On April 21st, the day after the bill was filed, on motion of the complainants, Will J. Bell, one of the complainants, was appointed receiver. On May 7, 1920, the defendants made a motion to discharge the receiver and on the following day, May 8th, complainants by leave of court, amended their bill, setting up that the defendants had committed waste on the premises which were covered by the trust deed. On June

Opinion filed Feb. 11, 1985.

Mr. Justice Dorian O'Connor delivered the opinion of the court.

On April 10, 1980, Robert Jones and Will G. Smith, Trustee, filed their bill to foreclose a trust deed given to secure an indebtedness of $4,000.00. The note and trust deed were dated November 18, 1972, and the indebtedness was due five years after date. The time of payment was extended five years and became due on extended, December 18, 1980. The sole defense alleged in the bill was the alleged failure of Assurity to produce fire insurance on the premises in accordance with the terms of the trust deed. Complainants contending that they had the right to declare the entire debt due by reason of such failure. The bill also alleged the insolvency of the maker of the note. On April 22nd, the day after the bill was filed, on motion of the complainants, Will G. Smith, one of the complainants, was appointed receiver. On May 7, 1980, the defendants made a motion to discharge the receiver and on the following day, May 8th, complainants by leave of court, amended their bill, setting up that the defendants had conveyed certain on the premises which were covered by the trust deed. On June

14th, the motion of the defendants to discharge the receiver was denied. On March 15, 1923, the defendants filed their answer, denying that they had failed to take out insurance as required by the trust deed, and further denying that the maker of the note was insolvent or that waste had been committed, and averred that the defendants had been guilty of no default. The cause was referred to a master in chancery to take proofs and make his report, which was accordingly done. The master found in favor of the defendants; that there had been no default in reference to the insurance; that no waste had been committed and that the maker of the note was not insolvent, but was worth over $200,000.00, and recommended that the bill be dismissed for want of equity at complainants' cost. Objections to the report, filed by complainants, were overruled and upon coming in of the report, they were ordered to stand as exceptions before the chancellor, where they were again overruled.

The receiver filed his report, to which the defendants filed objections, some of which were sustained and a decree entered on June 25, 1923. The decree found that the receiver had collected $1951.00 as rent for the premises, with which he was charged and he was credited with items as follows: amount paid for plumbing $35.00; amount paid for water taxes $3.50; amount paid for receiver's bonds $30.00; amount paid to attorneys for preparing and filing receiver's reports and accounts, $50.00; making a total of $108.50. The receiver was ordered to turn over the balance in his hands of $1808.50 to the complainant, Edward Bernds, to apply on the principal and interest, evidenced by the $4000.00 note. The bill was

dismissed for want of equity at complainants' cost.

Both complainants and defendants prayed and were allowed appeals to this court. The defendants perfected their appeal and the complainants have filed cross errors. The defendants, of course, were satisfied with the master's finding and the decree, except that they contend that the decree is wrong in two particulars; (1) in allowing the receiver credit for the $108.50; and (2) in ordering the receiver to turn the balance in his hands over to the complainant. On the other hand, the complainants contend that the court erred in dismissing their bill and in not entering a decree of foreclosure as prayed for.

The defendants have filed in this court a plea of release of cross-errors, wherein they aver that complainants after the entry of the decree and after the appeal was perfected in this court, accepted the benefits of the decree taking from the receiver the $1808.50. Complainants and cross-defendants have filed a demurrer to the plea and the matter was reserved to the hearing. It will be observed that the decree ordered the receiver to turn over to the complainant, Bernds, the amount remaining in his hands to be applied on the indebtedness secured by the trust deed. It is elementary that a party to a decree cannot accept the benefits of a part of it and complain as to the balance of the decree. Complainant having accepted the $1808.50 under the decree, cannot now be heard to say that the decree was wrong in dismissing the bill. The demurrer to the plea of release of errors is overruled, and, therefore, the cross-errors assigned by the complainants cannot be considered here.

The defendants contend that the court erred in crediting thereceiver with $108.50, for the reason that the master found, and the decree affirmed the findings of the master, that the complainants were not warranted in filing the bill to foreclose, and therefore, there was nowarrant for the appointment of the receiver, and that where a receiver is wrongfully appointed on motion of complainants, the costs of the receivership should be taxed against the complainants. We think this contention must be sustained, but we think the court was warranted in crediting the receiver with the $25.00 which he had paid out for plumbing and the $3.50 for water taxes. The payment of these two items was necessary and inured to the benefit of the defendants. We are also of the opinion that the court in allowing the receiver $30.00 which he had paid for three years' premium on his bond and in allowing $50.00 attorneys fees in preparing and filing the receiver's report erred in charging those items against the defendant. These two items should have been charged against complainants, because it was through complainants' fault that this expense was incurred.

The defendants next contend that the court erred in decreeing that the $1808.50 remaining in the hands of the receiver be turned over to Edward Bernds, complainant, to apply on the indebtedness secured by the trust deed. If the matter were properly before us, we might be inclined to agree with the contention of the defendants, but we think that the defendants by filing their plea of release of cross-errors, wherein they set up that after the entry of the decree, complainant, Bernds, had accepted the benefit of the decree by receiving from the receiver the $1808.50, estops them from

now contending that Bernds, should return this money and that it be awarded to the defendants. Defendants ought not be permitted to contend as they did by their plea, that Bernds having accepted the benefit of the decree could not complain that the decree was wrong, and then when the defendants' contention in this respect is sustained, turn about and contend that Bernds should return the money he had taken under the decree and that it be awarded to them.

The decree of the Circuit Court of Cook County is modified in respect to the $80.00 above mentioned, and in all other respects it is affirmed. Complainants, however, will be required to pay all court costs.

The decree of the Circuit Court of Cook County is modified and affirmed.

DECREE MODIFIED AND AFFIRMED.

Thomson, J. and Taylor, J. Concur.

405 - 29063

236 I.A. 645

JOE CAMERON,

Appellee,

v.

INDEMNITY COMPANY OF AMERICA,
a corporation,

Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed Feb. 11, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of assumpsit upon an automobile theft insurance policy issued by the defendant to recover damages claimed to have been sustained by reason of the auctmobile, which was covered by the policy, having been stolen. The maximum liability as mentioned in the policy in case the automobile was stolen was $3900.00.

To the declaration the defendant filed the general issue and a special plea, together with an affidavit of merits. In its special plea it admitted a liability of $1800.00, and it was averred that upon the commencement of the suit tender was made of this amount to plaintiff but that the tender was refused. The plea further averred that the defendant was still ready and willing to pay the $1800.00. In the affidavit of merits the defendant set up that it had a good defense to that part of plaintiff's claim which was in excess of $1800.00; that under the policy it had the option of replacing the car stolen from plaintiff by a new one of like kind; that it

Opinion filed Feb. 11, 1965.

elected to exercise such option and tendered plaintiff a new car of the same type and model as that which was stolen from him and which the defendant could purchase for $1800.00, but that the plaintiff refused to accept the car and that afterwards the defendant offered to pay $1800.00.

Afterwards on motion of plaintiff, judgment was entered in his favor against the defendant for $1800.00 on the defendant's affidavit of merits, and the case was ordered to proceed as to the balance of plaintiff's claim. Sometime afterwards the defendant paid this judgment and by leave of court filed a plea to that effect. The case went to trial for the balance of plaintiff's claim, and there was a verdict in his favor for $800.00. The court required the plaintiff to remit the sum of $275.00 from the verdict and judgment was entered for the balance of $525.00. It is to reverse this judgment that the defendant appeals. Pleadings other than those mentioned, were filed by both parties, but it is unnecessary to refer to them in this opinion.

On the trial of the case there were two questions submitted to the jury: (1) did the defendant tender to plaintiff a car similar to the one covered by the policy and which had been stolen; and (2) was the amount awarded by the jury in addition to the $1800.00 and the judgment entered by the trial court in excess of the value of plaintiff's car? The evidence shows that on or about January 5th, 1921, plaintiff bought a new Haynes, model No. 47, four passenger tourister automobile, the list price being $2935.00. This car was stolen December 13, 1921, and it is to recover the loss sustained by such theft

[illegible] to [illegible] [illegible] are [illegible] plaintiff's [illegible] out of the same type and model as that which was stolen from him and which the defendant certain [illegible] for $1800.00, and that the plaintiff refused to accept the car and that after-wards the defendant offered to pay $1800.00.

Afterwards on motion of plaintiff, judgment was entered in his favor against the defendant for $1800.00 on the defendant's affidavit alleging, and the court was satisfied to proceed as to the balance of plaintiff's claim. Thereafter the defendant paid this judgment and by terms of [illegible] a plea of that effect. The case went to trial for the balance of plaintiff's claim, and there was a verdict in the amount of $1700.00. The court sustained the defendant's motion [illegible] $1700.00 from the verdict and entered judgment for the balance of $1800.00. It is to reverse this judgment that the defendant appeals. Pleadings other than those mentioned, were filed by both parties, but it is unnecessary to refer to them in this opinion.

On the basis of the above there were two questions submitted to the jury: (1) did the defendant tender to plaintiff a new motor in lieu of the one stolen by the [illegible] and that had been stolen, and (2) was the amount awarded by the jury in addition to the $1800.00 and the judgment entered by the trial court in excess of the value of plaintiff's car? The evidence shows that on or about January 8th, 1921, plaintiff bought a new Hupmobile, model 20, 4-door passenger touring automobile, the last motor being 20218. This car was stolen January 17, 1921, and it is to recover the loss sustained by such theft

that the instant case was brought. A witness for the plaintiff testified that he sold the automobile to plaintiff and that in addition to selling cars, he ran a service station and repair shop; that two or three weeks prior to the time the car was stolen, plaintiff brought the car to the witness' repair shop where the car was painted and the witness testified "we made a sport-model out of the car. * * * put on individual steps on the side, carriers, and it was re-painted and a sport-model touristor was made out of it. * * * We put on new tires at the time the car was re-painted and the individual steps and fenders put on it. The car was equipped with Biflex bumpers and two spot lights, one on each side of the wheel. A motormeter and a motormeter lock and a clock, two extra tires, one on each side, a right and left side, and new side carriers put on. There were two tire covers and the spot light and tools." This witness further testified after showing his familiarity and experience with automobiles, that at the time plaintiff's automobile was stolen, it was worth $2600.00.

Evidence offered on behalf of the defendant tended to show that after the car had been stolen and proof of loss made, plaintiff was notified by the defendant that the latter had decided to exercise its option under the policy and replace the car stolen by a similar car, and that plaintiff and representatives of the defendant went to the Triangle Motor Company's place of business in Chicago, which company was the distributer of Haynes automobiles, and at that time the testimony tends to show that they offered to give to plaintiff a new Haynes touristor car, No. 47. There was also evidence given on behalf of the

that the instant case was brought. A witness for the plaintiff testified that he said the defendants to plaintiff and that in addition to nothing more, he was a service station and repair shop that was or three weeks prior to the time the car was stolen. Plaintiff brought the car to the witness' repair shop where the car was painted and the witness testified "we made a sports model out of the car. " " " put on individual steps on the side, curtains, but it was re-painted and a sports-model trunk was made out of it. " " " We put on new fender on the car was re-painted and the individual steps and fenders put model. The car was equipped with Triton bumpers and two spotty lights, one on each side of the wheel. A speedometer and a speedometer lock and a clock. Two extra tires, one on each side, a right and left side, and two side mirrors and so. There were two tire covers and the spot light and tools." Fifty witness further testified after showing his familiarity and experience with automobiles, that at the time plaintiff's automobile was stolen, it was worth $800.00.

Witness offered on behalf of the defendant testimony to show that after the car had been stolen and proof of loss made, plaintiff was notified by the defendant that the latter had decided to rescinded the contract under the policy and refused the car tendered by a similar one, and that plaintiff and repair mechanic of the defendant went to the Studebaker Motor Company to place of business in Chicago, which company was the distributor of Byrne automobiles, and at that time the mechanic began to show that they offered to give to plaintiff a new Byrnes automobile car, Mo. 47. There was also evidence given on behalf of the

plaintiff to the effect that the car offered plaintiff at that time was not a new car, but that it showed evidence of wear and usage. There is no evidence, however, in the record that the car offered plaintiff at that time was the same kind of car as plaintiff's automobile was when it was stolen, or that it had the extras that were on plaintiff's automobile when it was stolen; nor is there any evidence that the car offered plaintiff was a sport model such as plaintiff's had been made into.

The jury were specifically instructed that if they found from the evidence plaintiff had been offered a car like the one which was stolen, he could not recover, and their verdict should be for the defendant. Under the evidence in the record, we are clearly of the opinion that we would not be warranted in holding that the verdict of the jury to the effect that plaintiff had not been offered a car similar to the stolen car was against the manifest weight of the evidence. In these circumstances, of course, the verdict cannot be disturbed.

2. Was the verdict and judgment excessive? Plaintiff had received $1800.00 in addition to the amount of the judgment involved, viz: $525.00, making the total value of the car, at the time it was stolen, $2325.00. As above stated, a witness for the plaintiff testified he had remodeled, repaired, re-painted and added new parts to the automobile; that it was worth $2600.00. None of the other witnesses were asked to give their opinion of the value of plaintiff's car in the condition it was as shown by the testimony of plaintiff's witness, but their testimony is to the effect that a No. 47 Haynes

Tourister car which had been used in the ordinary way from January until December would be depreciated certain specific percentages in their opinion, and that it would be worth so many dollars, and that a new Haynes car of model No. 47, such as plaintiff's car was when he purchased it, was then selling for $1800.00. It will be seen that none of defendant's witnesses were called upon, asked or gave an opinion as to the value of plaintiff's car in the condition it was just prior to the time it was stolen. Again the jury were specifically instructed, that if they believed from the evidence that plaintiff's car was not worth more than $1800.00, he could not recover. In view of the evidence in the record, we are clearly of the opinion that we would not be warranted in holding that the judgment entered by the trial judge, $525.00, is excessive.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, J. AND TAYLOR, J. CONCUR.

27 - 29098

236 I.A. 646

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

WALTER EVANS,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Feb. 11, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

An information was filed in the Municipal Court of Chicago, charging the defendant with an assault with a deadly weapon, viz, an automobile, with intention to inflict bodily harm upon one Frank Rhode, without any considerable provocation, and under circumstances showing an abandoned and malignant heart. A jury was waived and the cause submitted to the court and after a hearing the defendant was found guilty and he was sentenced to three months in the House of Correction and a fine of $500.00 was imposed.

It has been held that where the evidence warrants, a person may be guilty of an assault with an automobile. People v. Anderson, 310 Ill. 389, and cases there cited, People v. Glink, 216 Ill. App. 357.

The record discloses that about 12;45 o'clock on the morning of March 15, 1923, the defendant was driving an automobile south in Michigan Avenue, Chicago and as he approached the intersection of 18th street, an east and west street, the automobile collided with another automobile standing in Michigan avenue which was thrown against a third

O-tinion filed Feb. 11, 1938.

automobile which was also standing in Michigan avenue and as a result, Frank Rhode was caught between the two standing automobiles and severely injured. It further appears from the evidence that just before the accident Rhode was driving north in Michigan avenue. It had been raining and sleeting and the roadways were covered with ice and were very slippery. As Rhode neared the intersection of 18th street, a westbound street car in that street was crossing Michigan avenue and Rhode to avoid it turned slightly to the west to pass around the front end of the street car. He then turned toward the east and in doing so his car skidded, turning almost completely around. A southbound automobile driven by another man collided with Rhode's car, the two cars came to a stop just north of 18th street in the west roadway of Michigan avenue and Rhode and the driver of the other car got out to see what damage had been done, Rhode standing between the two automobiles. The defendant was driving south in Michigan Avenue at about nineteen miles per hour. There is some dispute as to whether there was any light on the rear of the standing automobiles as the defendant approached. The defendant testified that he saw the standing automobiles in his pathway when he was about 100 feet from them; that he immediately applied his brakes, but on account of the icy condition of the street, he was unable to stop, and his machine skidded and struck the southbond automobile, catching Rhode between the two cars, injuring him severely.

There is considerable testimony in the record tending to show that the defendant was under the influence of li-

automobile which was also crossing in Michigan avenue and on a month, from which was caught beneath the wheels. Injuring and unconscious and severely injured. It further appears from the evidence that just before the accident Shade was driving north in Michigan avenue. It had been raining and sleeting and the roadways were covered with ice and were very slippery. As Shade neared the intersection of 12th street, a westbound street car ahead stopped and suddenly Michigan avenue and Shade to avoid it turned slightly to the west to keep between the front and of the street car. He then turned toward the east and in doing so his car slightly struck Clark unfortunately struck. A surrounded unconscious during by another man and right Shade's car, the two men were in a very fine state of excited in the next vicinity of Michigan avenue and Shade and the driver of the other car got out to see what damage had been done, there standing between the two automobiles. The driver and was driving north in Michigan Avenue at about eighteen miles per hour. There is some dispute as to whether there was any light on the rear of the standing automobiles on the occasion mentioned. The defendant testified that he saw the standing automobiles in his opinion when he was about 100 feet from them; that he immediately applied his brakes, but on account of the icy conditions of the street, he was unable to stop, and his machine collided and struck the outside front automobile, pushing them between the two cars, injuring him severely.

There is considerable testimony in the record tending to show that the defendant was under the influence of liq-

quor. He was taken to the police station and the record discloses that another charge was placed against him, viz: that of driving an automobile under the influence of liquor, which had not been heard at the time of the trial of the case before us. Evidence was also offered on behalf of the defendant, tending to show that he was not under the influence of liquor and that the accident was unavoidable.

We have carefully examined all of the evidence in the record and are of the opinion that the evidence fails to show beyond a reasonable doubt, that the conduct of the defendant was so wilfully and wantonly reckless as to justify the finding of guilty as charged in the information. To warrant a conviction on the offense charged, it must appear from the evidence that the defendant at the time in question was wilfully and wantonly reckless in the driving of the automobile. We think the evidence does not warrant such a conclusion.

The injury to Mr. Rhode was serious and very unfortunate, but we think the evidence is insufficient to sustain the judgment and, therefore, the judgment of the Municipal Court of Chicago is reversed.

REVERSED.

THOMSON, J. AND TAYLOR, J. CONCUR.

Term No. 51
Gen. No. 29134

236 I.A. 646

WILLIAM H. SIMPSON,
Defendant Error,

vs.

JOHN S. FOREMAN,
Plaintiff in Error

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Feb. 11, 1925.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of the fourth class in the Municipal Court of Chicago against the defendant to recover $163.18, claimed to be due plaintiff from the defendant in accordance with an agreement entered into , whereby the defendant agreed to pay plaintiff, in case plaintiff should secure a reduction of defendant's taxes on certain real estate in Cook County, one half of the amount of the reduction for the year 1923. The trial was before the court without a jury and there was a finding and judgment in plaintiff's favor for $163.18, and the defendant appeals.

The bill of exceptions or statement of facts appearing on the trial are set out in narrative form in the record. From this it appears that plaintiff testified that in the year of 1921 he had secured, for the defendant, a reduction of the value placed on defendant's buildings, which were located on some of defendant's real estate and was paid by the defendant for such services; that in the spring of 1923 plaintiff talked to the defendant over the telephone and told him that that year a value would be placed on defendant's real estate for the purpose of taxation for the years 1923, 1924, 1925, and 1926,

and the plaintiff asked the defendant whether he wished plaintiff to secure a reduction of the valuation of the buildings for him again, and that the defendant told him to go ahead in the matter in reference to four pieces of property and to check the legal description with the defendant, the property being those parcels named in the statement of claim; that it was agreed that plaintiff's compensation was to be one-half of the amount saved for the year 1923; that plaintiff did so, "and secured a reduction of the valuation of the defendant's buildings." He then testified to the reductions made on each piece of property and that such reduction in valuation resulted in a reduction of $324.39 in the amount of taxes defendant was required to pay; that one-half of this was $162.18; that on May 22, 1925, he received a letter signed by John Foreman, stating that plaintiff had overcharged him in reference to some tax matters. There was other evidence as to the rate of tax and as to who paid the taxes on the property, concerning which plaintiff testified he had secured the reduction in taxes.

The defendant testified in his own behalf that he did not talk to plaintiff over the telephone in regard to the reduction of taxes, and did not authorize the plaintiff to take any steps in the matter for the years 1923, 1924, 1925 and 1926; that he did not write the letter which plaintiff introduced in evidence; that he did not own two pieces of property described in the statement of claim. Upon being interrogated by the court he admitted "that he owned the three pieces described as sub-lots 17, 18, and 19, sub-lot 4 and sub-lot 139, but denied owning sub-lot 5 in lot 20." At this point the record discloses that the court adjourned until two o'clock in the afternoon of the

same day, the defendant stating to the court he would not be present that afternoon, that the court could enter any judgment that it might see fit, and the defendant would appeal. On the hearing at the afternoon session, a witness testified that he had examined the records in the recorder's office and they showed that defendant owned sub-lot 5 in lot 20.

The defendant contends that the judgment should be reversed because the statement of claim filed by the plaintiff did not state a cause of action. We have repeatedly held that where a case of the fourth class of the Municipal Court has been heard upon the merits, it is not necessary that the statement of claim state a legal cause of action. McLunn v. Gillespie 227 Ill. App. 400 and cases there cited.

Defendant further contends that plaintiff did not prove his case by a preponderance of the evidence, because plaintiff testified that he made his agreement with the defendant over the telephone and that the defendant flatly denied that he had talked with plaintiff in regard to the matter at all. This question like the first one above decided has been frequently considered by this court, and we have in numerous cases held that the question of the preponderance of the evidence does not arise at all in this court, that such question is for the trial court, and if the trial court, where the case is tried without a jury, is of the opinion that the evidence is at most, but evenly balanced, the plaintiff cannot recover; but where the court has heard the witnesses testify and observed their demeanor on the stand, and has entered judgment in favor of the plaintiff where his case is made out by his own testimony and

denied by the testimony of the defendant, then this court cannot disturb the finding, unless we are able to say that it is manifestly against the weight of the evidence. This court can never say that where a certain set of facts is testified to by the plaintiff and these facts are denied *in toto* by the defendant under oath, and there is nothing else in the record, no one can say that these witnesses are "equally credible" by a mere reading of the printed page. That question can only be determined by the trial judge or the jury in whose ocular presence the witnesses appear and testify. Unfortunately, however, there are cases which tend to support the defendant's position, where the opinions were written by other divisions of this court, and there is some *dicta* in a few cases of the Supreme Court to the same effect, but in our opinion there can be no question, but that the rule stated above is the correct one. First State Bank of *Plano* v. *Isaacs*, 281 Ill. App. 658; *Ately* v. *Kiser*, 6 Ill. App. 208; *Sears, Roebuck & Co.* v. *Sears Slayton Co.* 226 Ill. App. 287; *West Chicago R. R. Co.* v. *Lissarowitz*, 197 Ill. 507; *Libby, McNeill & Libby*, v. *Cook*, 222 Ill. 206.

In the case of Libby, McNeill & Libby, where an extended review of the authorities is made as to when there should be a directed verdict for the defendant, the court said that in passing upon such motion "The question of the preponderance of the evidence does not arise at all. Evidence fairly tending to prove the cause of action set out in the declaration may be the testimony of one witness only, and he may be directly contradicted by twenty witnesses of equal or

greater credibility; still the motion must be denied, and if a verdict for the plaintiff follows, the question whether it is manifestly against the weight of the evidence is for the trial court upon a motion for a new trial, and, in the event of that motion being overruled and a judgment entered, for the Appellate Court upon error properly assigned."

Other contentions made by the defendant are that some of the evidence introduced concerning the records of Cook County are hearsay, and therefore, not the best evidence. Hearsay evidence is admissible where the point that it is hearsay evidence is not made on the trial.

The record further discloses, contrary to defendant's contention that plaintiff performed services as agreed to by him and secured a reduction in defendant's taxes. Some complaint is also made that the record shows, according to plaintiff's statement of claim that he was employed in reference to reducing taxes on certain property designated only by street numbers, while the evidence shows that the services rendered applied to certain lots and blocks. No objection was made on the trial to this, nor is there any contention made here that the legal description was not of the same property as that designated by street number only.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, J. and THOMSON, J. CONCUR.

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Rehearing Denied
Feb 7 1925

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

236 I.A. 647

resent--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On APR 1 [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7185 Agenda No. 51

Eugene M. Uhden, Executor, etc.,
Defendant in error,
vs.
Otho B. King, Plaintiff in Error,

Writ of Error to the
Circuit Court of Peoria County



Jones, J:

The plaintiff in error was attached for contempt of court for failure to pay alimony awarded plaintiff in error's wife. Upon the hearing, the court ordered the plaintiff in error to pay $900, the balance due, to the Master in Chancery of the court. From that order, the plaintiff in error prosecuted this writ of error.

The plaintiff in error filed suit in the circuit court of Peoria County against his wife, Cornelia King, for a divorce in 1914. She was not of strong mind and a guardian ad litem was appointed for her. A decree of divorce was granted the complainant. By agreement of the parties, the decree contained a provision for the payment of alimony in the sum of $2000 by the complainant to Maude H. Uhden, mother of Cornelia King, for her support and maintenance. The payment was to be made in monthly installments of $30.00 each.

After the decree was entered, Cornelia King was adjudged insane, by the county court of Cook County, and sent to an asylum, where she has since remained. Sometime after she was adjudged insane, conservators were appointed for her by the probate court of Cook County. Maude H. Uhden, the mother of Cornelia King, died and her executor filed this petition in the circuit court of Peoria county against the plaintiff in error for failure to pay the balance of the alimony. The plaintiff in error was arrested in Chicago and appeared in the circuit court of Peoria county. He admitted his liability, asserted his willingness to pay the balance due, but defendad on the ground that the alimony should not be paid to the executor. He also filed an answer to the petition for attachment setting up that conservators had been

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The plaintiff in error filed suit in the circuit court of Peoria County against his wife, Cornelia King, for a divorce in 1914. She was not of strong mind and a guardian ad litem was appointed for her. A decree of divorce was granted the complainant. By agreement of the parties, the decree contained a provision for the payment of alimony in the sum of $8000 by the complainant to Maude H. Uhden, mother of Cornelia King, for her support and maintenance. The payment was to be made in monthly instalments of $30.00 each.

After the decree was entered, Cornelia King was adjudged insane, by the county court of Cook County, and sent to an asylum, where she has since remained. Sometime after she was adjudged insane, conservators were appointed for her by the probate court of Cook County. Maude H. Uhden, the mother of Cornelia King, died and her executor filed this petition in the circuit court of Peoria county against the plaintiff in error for failure to pay the balance of the alimony. The plaintiff in error was arrested in Chicago and appeared in the circuit court of Peoria county. He admitted his liability, asserted his willingness to pay the balance due, but defended on the ground that the alimony should not be paid to the executor. He also filed an answer to the petition for attachment setting up that conservators had been

appointed for Cornelia King and that they were the proper persons to receive the payment. Upon the hearingg the court ordered the plaintiff in error to pay the balance to the Master in Chancery.

Thereafter the plaintiff in error sued out this writ of error. He did not however, make Eugene M. Uhden executor of the last will of Maude H. Uhden, deceased, a party and no notice was served upon the executor.

Upon the writ of error being sued out, the conservators of Cornelia King appeared in this court and confessed the errors assigned and this court thereupon reversed and remanded the cause. Before the adjournment of the term however, counsel representing the estate of Maude H. Uhden, came into this court, called the attention of the court to the fact that the persons who had confessed the errors were not the real parties in interest in the cuit and were not the petitioners in the circuit court of Peoria county. For that reason we vacated the orders confessing the errors and the case has been taken upon hearin.g.

The only defense made by the plaintiff in error in the trial court was that the court should have ordered the payment to be made to the conservators of Cornelia King. It is not claimed that the plaintiff in error is not able to pay the amount, but on the contrary, he expresses his willingness to make the payment provided it be made to the conservators. He complains that the trial court failed to consider his answers filed to the petition for attachment for contempt. There is nothing in the record to show that the court disregarded the answer but on the contrary the order especially recites that the cause came on for hearing upon the petition of the executor and the answer of the plaintiff in error. We see no merit in that contention.

It is also contended that Maude H. Uhden took no interest in the fund although it was ordered to be paid to her. Whether the court had a right in the first instance to direct the payment to be made to Maude H. Uhden over the objection of the plaintiff in error, is immaterial because the decree for alimony was entered

appointed for Cornelia King and that they were the proper persons to receive the payment. Upon the hearing the court ordered the plaintiff in error to pay the balance to the Master in Chancery.

Thereafter the plaintiff in error sued out this writ of error. He did not however, make Eugene M. Ubben executor of the last will of Maude H. Ubben, deceased, a party and no notice was served upon the executor.

Upon the writ of error being sued out, the conservators of Cornelia King appeared in this court and confessed the errors assigned and this court thereupon reversed and remanded the cause. Before the adjournment of the term however, counsel representing the estate of Maude H. Ubben, came into this court, called the attention of the court to the fact that the persons who had confessed the errors were not the real parties in interest in the suit and were not the petitioners in the circuit court of Peoria county. For that reason we vacated the orders confessing the errors and the case has been taken upon hearing.

The only defense made by the plaintiff in error in the trial court was that the court should have ordered the payment to be made to the conservators of Cornelia King. It is not claimed that the plaintiff in error is not able to pay the amount, but on the contrary, he expresses his willingness to make the payment provided it be made to the conservators. He complains that the trial court failed to consider his answers filed to the petition for attachment for contempt. There is nothing in the record to show that the court disregarded the answer but on the contrary the order especially recites that the cause came on for hearing upon the petition of the executor and the answer of the plaintiff in error. We see no merit in that contention.

It is also contended that Maude H. Ubben took no interest in the fund although it was ordered to be paid to her. Whether the court had a right in the first instance to direct the payment to be made to Maude H. Ubben over the objection of the plaintiff in error, is immaterial because the decree for alimony was entered

by agreement between plaintiff in error and the guardian ad litem for Cornelia King. A decree entered by an agreement of the parties partakes not only of the nature of a decree but also of the nature of a contract and he who consents to the entry of a decree under such circumstances cannot thereafter question it. (Buck v. Buck, 60 Ill. 241; Story v. Story, 125 Ill. 608; Cavenaugh v. Cavenaugh, 106 Ill. App. 209.) But is contended that the death of Maude H. Uhden made inoperative that part of the decree and that the right to receive the payment would not descend to her personal representatives. It would appear that the trial court was doubtful on that point inasmuch as it ordered the fund to be paid to the Master in Chancery. But whether the contention of the plaintiff in error upon that point is correct need not be inquired into for the purpose of deciding this case. In the case of the People v. Lyons, 168 Ill. App. 396, the court said "The decree, which finds and settles the rights of the contestants is final and appealable but the court always retains jurisdiction to enter such further orders or decrees to the end that complete justice may be done between all the parties, necessary to carry into effect the original decree of the court. This power is inherent in a court of chancery and is also authorized by Par. 42 Chap, 22 Hurd's R.S."

A court of chancery may also inquire whether its judgment has been duly and properly executed. (Pam-to Pee v. United States 187 U.S. 371.) The court has inherent power to designate one of its officers to receive funds involved in any litigation.

The power of a court over a decree for alimony is not exhausted by the original decree and if events occurring subsequent to the entry of the decree make necessary a change in its terms in order to carry out the full purpose of the decree, the court has the authority to make such changes at any subsequent term of court. It is immaterial that several years even have intervened. (Cole v. Cole, 142 Ill. 19; Barkley v. Barkley, 184 Ill. 375; Welty v. Welty, 195 Ill. 335.)

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The power of a court over a decree for alimony is not exhausted by the original decree and if events occurring subsequent to the entry of the decree make necessary a change in its terms in order to carry out the full purpose of the decree, the court has the authority to make such changes at any subsequent term of court. It is immaterial that several years even have intervened. (Cole v. Cole, 142 Ill. 19; Barkley v. Barkley, 184 Ill. 375; Welty v. Welty, 195 Ill. 335.)

Inasmuch as the decree in this case provides that upon the payment of $900 to the Master in Chancery the plaintiff in error shall be discharged, we are impressed with the fact that the plaintiff in error is quibbling for delay in making the payment. This view is further strengthened by the fact that the original decree for alimony provides that if Cornelia King should die before the full $3000 were paid then the payments should cease. Whether her death before the payment would not release him in view of the fact that all payments are due need not be decided.

We are convinced that no substantial right of the plaintiff in error has been invaded by the trial court in this case and its decree will therefore be affirmed.

Decree affirmed.

Inasmuch as the decree in this case provides that upon the payment of $900 to the Master in Chancery the plaintiff in error shall be discharged, we are impressed with the fact that the plaintiff in error is quibbling for delay in making the payment. This view is further strengthened by the fact that the original decree for alimony provides that if Cornelia King should die before the full $2000 were paid then the payments should cease. Whether her death before the payment would not release him in view of the fact that all payments are due need not be decided.

We are convinced that no substantial right of the plaintiff in error has been invaded by the trial court in this case and its decree will therefore be affirmed.

Decree affirmed.

TATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT.

and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof.

o hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in

ne above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of March in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson

*Clerk of the Appellate Court.*

(Apr)

Rehearing Denied
February 7, 1925

AT A TERM OF THE APPELLATE COURT,

egun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

236 I.A. 647

resent--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 4 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

W. F. Childs & Co. Ltd. a corporation,

appellant,

vs.

Aurora Brewing Co. a corporation,

appellee,

Appeal from the County Court of Kane County.

Jett, P. J.

This is a suit in assumpsit brought in the County Court of Kane County, by W. F. Childs & Co. Ltd. a corporation, appellant, against Aurora Brewing Co. a corporation, appellee, to recover for a sale of 4000 pounds of sugar on January 23, 1920, at a price of $790. Appellee filed a set off claiming damages on account of the alleged failure of the appellant to deliver to it, according to the terms of an oral contract, 150 bags of sugar previously purchased by it of appellant at $12.50 per hundred pounds.

A trial was had by the court without the intervention of a jury, and the court found for appellee and appellant prosecutes this appeal. The declaration consists of the common counts with an affidavit of claim attached.

Appellee pleaded the general issue and a special plea setting up that appellant, before and at the time of the commencement of the suit was indebted to it, in the sum of $797.50 growing out of a breach of contract entered into between the pa rties September 23, 1919, by the terms of which contract appellant contracted to sell and did sell to appellee 150 bags of sugar of 100 pounds each at the agreed price of $12.50 per one hundred pounds; that on the 22nd day of October, 1919, appellant delivered 4000 pounds, or 40 bags of sugar to appellee; that said sugar was paid for by appellee at the agreed price on the 31st day of October, 1919; that thereafter and on the 30th day of December, 1919, appellant refused to deliver to appellee the remaining quantity

Title

W. H. Childs & Co. Ltd. a corporation,

appellant,

vs.

Aurora Brewing Co. a corporation,

appellee.

Appeal from the County Court of Kane County.

Mott, P. J.

This is a suit in assumpsit brought in the County Court of Kane County, by W. H. Childs & Co. Ltd. a corporation, appellant, against Aurora Brewing Co. a corporation, appellee, to recover for a sale of 40000 pounds of sugar on January 23, 1920, at a price of $720. Appellee filed a set off claiming damages on account of the alleged failure of the appellant to deliver to it, according to the terms of an oral contract, 150 bags of sugar previously purchased by it of appellant at $12.50 per hundred pounds.

A trial was had by the court without the intervention of a jury, and the court found for appellee and appellant prosecutes this appeal. The declaration consists of the common counts with an affidavit of claim attached.

Appellee pleaded the general issue and a special plea setting up that appellant, before and at the time of the commencement of the suit was indebted to it, in the sum of $797.50 growing out of a breach of contract entered into between the parties September 23, 1919, by the terms of which contract appellant contracted to sell and did sell to appellee 150 bags of sugar of 100 pounds each at the agreed price of $12.50 per one hundred pounds; that on the 22nd day of October, 1919, appellant delivered 4500 pounds, or 45 bags of sugar to appellee; that said sugar was paid for by appellee at the agreed price on the 21st day of October, 1919; that thereafter and on the 30th day of December, 1919, appellant refused to deliver to appellee the remaining quantity

of sugar under the terms of said contract; that the market price of sugar on the date appellee refused to perform the contract was $19.75 per hundred pounds; that appellee was compelled to and did purchase of others in the market, sugar at the market price after the refusal of appellant to deliver the sugar so contracted for; that by reason of the breach of contract by appellant appellee sustained damages in the sum of $797.50.

To the special plea of appellee, appellant filed numerous replications and a demurrer was sustained to all of the replications filed by appellant, except those which presented the question of the agents authority to make the sale, set up in the special plea and the question of waiver of damages. A trial was had with the result as aforesaid. No propositions of law were submitted.

Appellee offered evidence in support of its contention that in the month of September, 1919, it ordered from appellant, 150 bags of sugar of 100 pounds each at a price of $12.50 per 100 pounds; that it was agreed that all of the sugar was not to be delivered at once and if it was made in shipments of 40 or 50 bags at a time it would be satisfactory to appellee; that on the 22nd day of October, 1919, appellant shipped 40 bags of sugar to appellee according to the terms of the contract; that this amount of sugar was received by appellee at its plant in Aurora and was paid for October 31, 1919; that appellant refused to make any further shipment according to the terms of the contract. Appellant denies the making of the contract relied upon by appellee and insists that by reason of a subsequent order for sugar which was fully executed, it was agreed by the parties that appellee should abandon its claim under the oral contract.

It is first urged by appellant that appellee has failed to establish its plea of set off by the preponderance of the testimony.

Upon an examination of the record the evidence is found to be conflicting. The findings of a trial court in a non-jury case have the same weight and effect as the verdict of a jury, and a court of review would not be warranted in setting aside such finding unless it is manifestly against the weight of the evidence. Ellsworth v. Butler, 170

sugar under the terms of said contract; that the market price of sugar on the date appellee refused to perform the contract was $19.75 per hundred pounds; that appellee was compelled to and did purchase sugar in the market, sugar at the market price after the refusal of appellant to deliver the sugar as contracted for; that by reason of the breach of contract by appellant appellee sustained damages in the sum of $797.50.

To the special plea of appellee, appellant filed numerous replications and a demurrer was sustained to all of the replications filed by appellant, except those which presented the question of the agents authority to make the sale, set up in the special plea and the question of waiver of damages. A trial was had with the result as aforesaid, the propositions of law were submitted.

Appellee offered evidence in support of its contention that in the month of September, 1919, it ordered from appellant, 150 bags of sugar of 100 pounds each at a price of $18.50 per 100 pounds; that it was agreed that all of the sugar was not to be delivered at once and that it was made in shipments of 40 or 50 bags at a time it would be satisfactory to appellee; that on the 22nd day of October, 1919, appellant shipped 40 bags of sugar to appellee according to the terms of the contract; that this amount of sugar was received by appellee at the plant in Amora and was paid for October 23, 1919; that appellant refused to make any further shipment according to the terms of the contract. Appellant denies the making of the contract relied upon by appellee and insists that by reason of a subsequent order for sugar which was fully executed, it was agreed by the parties that appellee would abandon its claim under the oral contract.

It is first urged by appellant that appellee has failed to establish its plea of set off by the preponderance of the testimony.

Upon an examination of the record the evidence is found to be conflicting. The finding of a trial court in a non-jury case has the weight and effect as the verdict of a jury, and a court of review will not be warranted in setting aside such finding unless it is manifestly against the weight of the evidence. Billsworth v. Butler, 170

Ill. App. 66; Gutmann v. Eichner, 167 Ill. App. 313; Mason v. Krag, 191 Ill. App. 1; Springer vs David Manufacturing Company, 191 Ill. App. 45; MacCracken vs. First National Bank of Wheaton, 204 Ill. App. 20; Hooper vs. Kaskaskia Live Stock Insurance Company, 201 Ill. App. 167. We cannot say that the finding is against the manifest weight of the testimony.

It is insisted by the appellant that the matters and things set up in the plea of set off could not be proven in the case because they were unliquidated damages arising out of a subject matter disconnected from the subject matter of the appellant's claim. It will be remembered that the plea of set off was not challenged by the appellant by demurrer; and that no propositions of law were submitted.

In view of the state of the record it is our opinion the only matters open for review are whether or not the court ruled correctly on admission and exclusion of testimony and the sufficiency of the evidence to support the finding. Bione vs. Bell, 221 Ill. App. 434-436, and cases there cited.

Where a trial is before the court without the intervention of a jury questions of law can only be raised and urged by complying with Section 61 of the Practice Act. Where no propositions of law or fact are held by the trial court in a non-jury case the Appellate Court is not informed on what grounds the trial court based its judgment and all rulings of the court on questions of law are presumed to be correct. J.Spencer Turner Company vs. Schwill, 195 Ill. App. 432; Fellows vs. Johnson, 183 Ill. App. 42; Knox Engineering Company vs. Railway Company, 181 Ill. App. 350.

It is contended by appellant that since the amount involved exceeds $500. the verbal contract relied upon by appellee contravenes the Statute of Frauds. The question of whether or not the Statute of Frauds applies to the sale in this case and whether the court correctly applied the law in that respect are questions of law which are not open for review in this court, no propositions of law having been submitted. Chambers vs. Allin, 167 Ill. App. 396.

Ill. App. 66; [illegible]man v. Bichner, 167 Ill. App. 216; Mason v. [illegible], [illegible] Ill. App. 1; Springer vs David Manufacturing Company, 191 Ill. [illegible]. 46; Macdrazen vs. First National Bank of Wheaton, 204 Ill. App. [illegible]; Hoover vs. Lambkin [illegible] Stock Insurance Company, 201 Ill. App. [illegible]. We cannot say that the finding is against the manifest weight [illegible] the testimony.

It is insisted by the appellant that the matters and things set [illegible] in the plea of set off could not be proven in the case because they were unliquidated damages arising out of a subject matter disconnected [illegible] the subject matter of the appellant's claim. It will be remembered that the plea of set off was not challenged by the appellant by demurrer; and that no propositions of law were submitted.

[illegible] view of the state of the record it is our opinion the only [illegible] are open for review are whether or not the court ruled correctly on admission and exclusion of testimony and the sufficiency of the evidence to support the finding. Stone vs. Bell, 221 Ill. App. 488-489, and cases there cited.

Where a trial is before the court without the intervention of a jury questions of law [illegible] [illegible] of the Practice Act. When no propositions of law or fact are held by the trial court in a non-jury case the Appellate Court is not informed on what grounds the trial court based its judgment and all rulings of the court on questions of law are presumed to be correct. Tennessee [illegible] Company vs. Schwill, 198 Ill. App. 482; Hallows vs. Johnson, 188 Ill. App. 43; Lynx [illegible] Company vs. Railway Company, 181 Ill. App. [illegible].

It is contended by appellant that since the amount involved exceeds $500. the verbal contract relied upon by appellee contravenes the statute of Frauds. The question of whether or not the Statute of Frauds applies to the sale in this case and whether the court correctly applied the law in that respect are questions of law which are not open for review in this court, no propositions of law having been submitted. Dunmore vs. Allin, 167 Ill. App. 396.

We conclude, therefore, that the judgment of the County Court of Kane County should be affirmed, which is accordingly done.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of March in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson
*Clerk of the Appellate Court.*

1 (Apr.)

Hearing Denied February XIII = F.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:



Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 4 - 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Howard White, Trustee in Bankruptcy of Glasford Banner Farmers' Elevators, a corporation,

appellee,

vs.

Turner-Hudnut Company,

appellant,



Appeal from Circuit Court of Peoria County.

Jett, P. J. This is a suit in assumpsit commenced in the Circuit Court of Peoria county by the Glasford Banner Farmers' Elevators, appellee, against Turner-Hudnut Company, appellant, to recover for grain sold and delivered by appellee to the appellant company and for which payment has not been made. A trial was had by the court without a jury and a judgment was obtained by appellee against the appellant for the sum of $7450.71 and costs of suit, from which judgment appellant prosecutes this appeal.

The declaration consists of the common counts. The appellee was required, on motion of appellant, before it pleaded, to file a bill of particulars. To the declaration appellant pleaded the general issue and a plea of payment. To the plea of payment appellee replied that the payment claimed was merely by the way of credit and void because the transactions for which the credit was given were gambling transactions.

By leave of the court, appellant rejoined double to the replication filed by appellee, by first denying the transactions for which the credit was given were gambling transactions and secondly by admitting the gambling transactions, but claiming that a recovery was barred by the six months statute of limitations. To the second rejoinder appellee demurred and the court sustained the demurrer. Appellant stood by its rejoinder. The Glasford Banner Farmers' Elevators went into bankruptcy and Howard White was appointed trustee, and he was susbstituted as plaintiff by the court.

Howard White, Trustee in Bankruptcy of
Glasford Hammer Farmers' Elevators, a
corporation,

appellee,

vs.

Turner-Hudnut Company,

appellant,

Appeal from Circuit Court
of Peoria County.

Mott, P. J. This is a suit in assumpsit commenced in the Circuit Court of Peoria county by the Glasford Hammer Farmers' Elevators, appellee, against Turner-Hudnut Company, appellant, to recover for grain sold and delivered by appellee to the appellant company and for which payment has not been made. A trial was had by the court without a jury and a judgment was obtained by appellee against the appellant for the sum of $1,240.[illegible] and costs of suit, from which judgment appellant prosecutes this appeal.

The declaration consists of the common counts. The appellee was required, on motion of appellant, before it pleaded, to file a bill of particulars. To the declaration appellant pleaded the general issue and a plea of payment. To the plea of payment appellee replied that the payment claimed was merely by the way of credit and void because the transactions for which the credit was given were gambling transactions.

By leave of the court, appellant rejoined double to the replication filed by appellee, by first denying the transactions for which the credit was given were gambling transactions and secondly by admitting the gambling transactions, but claiming that a recovery was barred by the six months statute of limitations. To the second rejoinder appellee demurred and the court sustained the demurrer. Appellant stood by its rejoinder. The Glasford Hammer Farmers' Elevators went into bankruptcy and Howard White was appointed trustee, and he was substituted as plaintiff by the court.

The case was tried on the issues as above joined with the result as aforesaid. The evidence shows that the Glasford Banner Farmers' Elevators was a corporation. It began business July 1, 1919, with its main elevator and home office at Glasford Illinois. After July 1, 1919, it constructed two elevators on the Illinois River. One located at Bell Landing, and one at Mackay Landing. The Bell Landing elevator was after its completion used by the company all the time of the company's existence. The Mackay Landing elevator because of poor construction, was used only a short time. The elevator at Glasford had a capacity of 10,000 bushels and the capacity of the Bell Landing elevator was in the neighborhood of 19,000 to 20,000 bushels.

The Turner-Hudnut company is engaged in the commission grain business at Peoria, dealing in both cash and futures. It appears that appellant had two departments through which it handled grain. One was the cash grain department, and the other the future department. The grain handled through the cash grain department was received by the appellant and sold on commission, and accounted for by appellant to the shipper. In the future department deals were made by telegram to agents who appeared to have bought or sold on the Chicago Board of Trade. Mr. Thomas O'Laughlin was manager of this department. His office was equiped with tickers, and blackboard on which the market prices were entered every few minutes as they came in over the wire from Chicago.

Appellee company was engaged in buying and selling grain for actual delivery. It bought grain from the farmers residing in the vicinity where the elevators were located and sold and delivered it to the appellant and other purchasers, and the evidence shows that grain to the value of $7450.91 was shipped and delivered by appellee to appellant which grain appellee insists it has the right to recover for in this proceeding.

It appears that the manager of appellee either with or without its knowledge and consent had various transactions on the Chicago Board of Trade, through the appellant and bought and sold grain on which there

The case was tried on the issues as above joined with the result as aforesaid. The evidence shows that the Gilsford Farmer's Elevators was a corporation. It began business July 1, 1919, with its main elevator and home office at Gilsford Illinois. After July 1, 1919, it constructed two elevators on the Illinois River, [illegible] at Bell Landing, and one at Mooney Landing. The Bell Landing elevator was after its completion used by the company all the time of the company's existence. The Mooney Landing elevator because of poor construction, was used only a short time. The elevator at Gilsford has a capacity of 10,000 bushels and the capacity of the Bell Landing elevator was in the neighborhood of 15,000 to 20,000 bushels.

The Turner-Hadmut company is engaged in the commission grain business at Peoria, dealing in both cash and futures. It appears that appellant had two departments through which it handled grain. One was the cash grain department, and the other the future department. The grain handled through the cash grain department was received by the appellant and sold on commission, [illegible] shipper. In the future department [illegible] appellant to have [illegible] Thomas O'Laughlin was manager of this department. His office was equipped with tickers, and blackboard on which the market prices were entered every few minutes as they came in over the wire from Chicago.

Appellee company was engaged in buying and selling grain for actual delivery. It bought grain from the farmers residing in the vicinity where the elevators were located and sold and delivered it to the appellant and other purchasers, and the evidence shows that grain to the value of $7450.21 was shipped and delivered by appellee to appellant which grain appellee insists it has the right to recover for in this proceeding.

It appears that the manager of appellee [illegible] the knowledge that [illegible] had various transactions on the Chicago Board of Trade, through the appellant and hedged and sold grain on that Board

was a loss of more than $7000. By an agreement entered into by the appellant and appellee the amount of the loss on the grain purchased on the Chicago Board of Trade was set off against the amount of grain actually shipped by appellee to appellant.

It is the contention of appellant that the future transactions were not gambling transactions and could lawfully be set off against the amounts due for cash grain; that the court erred in excluding the rules and by laws of the Board of Trade of Chicago; that the court erred in excluding the testimony of the witness Cornish as to the conversation had with the witness Lightbody; that the court erred in sustaining appellee's demurrer to appellant's second rejoinder.

It is insisted that the judgment is contrary to the law and the evidence. This contention grows out of the claim of appellant that this suit is an attempt to recover for losses on the Board of Trade where there was no intention to deliver. It is contended by the appellant that there was an intention to deliver by both parties and that the trades cannot be said to be gambling transactions.

We have examined the testimony minutely. The evidence among other things shows that O'Laughlin who was the manager for the future department from and including October 8, 1919, to and including July 7, 1920, made twenty-one sales aggregating 183,000 bushels of corn and 10,000 bushels of oats for appellee and thirteen purchases aggregating 168,000 bushels of corn and 10,000 bushels of oats. None of this grain was delivered or received by the elevators company. Covering this period of time from October 8, 1919, to July 7, 1920, there were sixteen distinct settlements made between the appellee company and the appellant company for these future deals and these settlements were all made upon margins with a net loss to the appellee company of $7450.91.

From the facts and circumstances as disclosed in this record, the conclusion is irresistible that there was no intention to deliver by both parties as is contended for by appellant. On the contrary we are clearly of the opinion the evidence shows that these purchases and sales of this large amount of grain were intended to be settled on margins and there by under the law were gambling transactions. It will

was a loss of more than $7000. By an agreement entered into by the appellant and appellee the amount of the loss on the grain purchased for the Chicago Board of Trade was set off against the amount of grain actually shipped by appellee to appellant.

It is the contention of appellant that the future transactions were not gambling transactions and could lawfully be set off against the amounts due for cash grain; that the court erred in excluding the rules and by laws of the Board of Trade of Chicago; that the court erred in excluding the testimony of the witness Cornish as to the conversation had with the witness Lightbody; that the court erred in sustaining appellee's demurrer to appellant's second rejoinder.

It is insisted that the judgment is contrary to the law and the evidence. This contention grows out of the claim of appellant that this suit is an attempt to recover for losses on the Board of Trade where there was no intention to deliver. It is contended by the appellant that there was an intention to deliver by both parties and that the trades cannot be said to be gambling transactions.

We have examined the testimony minutely. The evidence among other things shows that O'Leughlin who was the manager for the future department from and including October 4, 1919, to and including July 7, 1920, made twenty-one sales aggregating 188,000 bushels of corn and 10,000 bushels of oats for appellee and thirteen purchases aggregating 188,000 bushels of corn and 10,000 bushels of oats. None of this grain was delivered or received by the elevators company. Covering this period of time from October 6, 1919, to July 7, 1920, there were sixteen distinct settlements made between the appellee company and the appellant company for these future deals and these settlements were all made upon margins with a net loss to the appellee company of $7483.91.

Upon the facts and circumstances as disclosed in this record, the conclusion is irresistible that there was no intention to deliver by both parties as is contended for by appellant. On the contrary we are clearly of the opinion the evidence shows that these purchases and sales of this large amount of grain were intended to be settled on margins and there by under the law were gambling transactions. It will

remembered however, that this is not a suit for losses occasioned in gambling in grain transactions but it is a suit for the recovery of the value of grain actually sold and delivered by the appellee to the appellant and not paid for. There is, as a matter of fact, no dispute but what grain of the value of the amount of the judgment was sold and delivered by appellee to appellant. The determination of this question is practically conclusive of all of the other questions raised upon this appeal.

The next contention is that the court improperly excluded the rules of the Chicago Board of Trade. As this is not a suit for the recovery of losses occasioned in gambling transactions but is for grain actually sold and delivered, it is immaterial what the rules of the Chicago Board of Trade may be. The court committed no error in excluding the rules.

Complaint is also made by appellant of the exclusion of certain conversations between the representatives of the respective parties to this proceeding, relative to the intention to deliver the grain which was purchased on the Chicago Board of Trade. What is said with reference to the exclusion of the rules of the Chicago Board of Trade is equally applicable to this contention. The court sustained a demurrer to the plea of payment filed by appellant. It is urged that the court erred in so doing. The plea of payment was based upon the fact that appellant owed appellee over $7000.00 for grain actually sold and delivered, and the assumption that appellee owed appellant about the same amount by reason of the transactions on the Board of Trade. Appellant sought to set off the sum it assumed was due it by reason of the Board of Trade deals. This it could not do.

Section 131 of Chapter 38 of the Revised Statutes provides, that all promises, notes, bills, bonds, covenants, contracts,agreements, judgments, mortgages or other securities or conveyances made, given, granted, drawn or entered into ********** in settlement of any gambling debt shall be null and void, therefore any settlement or attempted settlement or set off between the parties was void and of no effect, and the plea of payment as alleged was an improper plea, and the court

[illegible] however, that this is not a suit for losses occasioned in [illegible]ling in grain transactions but it is a suit for the recovery of the value of grain actually sold and delivered by the appellee to the appellant and not paid for. There is, as a matter of fact, no dispute [illegible] grain of the value of the amount of the judgment was sold and delivered by appellee to appellant. The determination of this question is practically conclusive of all of the other questions raised upon this appeal.

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Complaint is also made by appellant of the exclusion of certain [illegible] between the representatives of the respective parties to the proceeding, relative to the intention to deliver the grain which was purchased on the Chicago Board of Trade. What is said with reference to the exclusion of the rules of the Chicago Board of Trade is [illegible]ly applicable to this contention. The court sustained a demurrer to the plea of payment filed by appellant. It is urged that the court erred in so doing. The plea of payment was based upon the fact that appellant owed appellee over $7000.00 for grain actually sold and delivered, and the assumption that appellee owed appellant about the [illegible] amount by reason of the transactions on the Board of Trade. Appellant sought to set off the sum it assumed was due it by reason of the Board of Trade deals. This it could not do.

Section 121 of Chapter 38 of the Revised Statutes provides, that all promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages or other securities or conveyances made, given, granted, drawn or entered into ******* in settlement of any gambling debt shall be null and void, therefore any settlement or attempted set [illegible]ment or set off between the parties was void and of no effect, and the plea of payment as alleged was an improper plea, and the [illegible]

properly sustained the demurrer thereto.

We have examined all questions urged by appellant, and are of the opinion that the trial court committed no reversible error in the trial of this cause.

The judgment of the circuit court of Peoria County is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of March in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson
*Clerk of the Appellate Court.*

77(Gpd)

Rehearing denied February - 1925.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of April, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:



Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On OCT 4 - 1924 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

H. H. Troup, Walter C. Schneider,
Executors of the last will and
testament of Madeline E. Huling,
deceased,

appellants,

vs.

W. R. Hunter,

appellee,



Appeal from the Circuit Court
of Kankakee County.

Jett, P.J.

Madeline E. Huling, died in Kankakee County, June 30, 1919, leaving a will executed December 9, 1913, and codicil thereto dated June 4, 1914, both of which were probated. The will and codicil were drawn by W. R. Hunter, appellee, who had long been the attorney and business advisor of the said Madeline E. Huling, deceased. Appellants and one W. I. Holcomb, since deceased, were appointed executors and trustees and qualified as such. Appellee was retained as attorney for the estate by the executors and trustees. It appears that Mrs. Huling during her lifetime placed a fund of $2000 in the hands of appellee to be used by him in sustaining her will if attacked. It further appears that Mrs. Huling had executed a deed dated December 9, 1908, conveying to appellee her homestead which was to be used for certain purposes.

In 1920 the original bill in this proceeding was filed in the Circuit Court of Kankakee County, against appellee and others attacking the validity of the deed dated December 9, 1908, from Mrs. Huling to appellee Hunter of the homestead which was kept secret from appellants until he recorded it in September 1919, and among other relief praying an accounting of the $2000 fund which appellee had in his hands. On a hearing of the case the court decreed that said deed was void, and the Supreme Court in Troup et al vs. Hunter et al, 300 Ill. 110, on appeal by one of the defendants, other than Hunter, affirmed the

[illegible] H. H. Troup, Walter C. Schneider,
[illegible] of the last will and
[illegible] of Madeline E. Muling,
deceased,

[illegible]

va.

[illegible] H. Hunter,

appellee.

[illegible]ett, P.J.

Madeline E. Muling, died in Kankakee County, June 30, 1915, leaving a will executed December [illegible], 1912, and codicil thereto dated June [illegible], 1914, both of which were probated. The will and codicil were drawn by [illegible] H. Hunter, appellee, who had long been the attorney and business advisor of the said Madeline E. Muling, deceased. Appellants and one [illegible] I. Holcomb, since deceased, were appointed executors and trustees and qualified as such. Appellee was retained as attorney for the estate by the executors and trustees. It appears that Mrs. Muling during her lifetime placed a fund of $8000 in the hands of appellee to be used by him in establishing her will if attacked. It further appears that Mrs. Muling had executed a deed dated December 5, 1908, conveying to appellee her homestead which was to be used for certain purposes.

In 1920 the original bill in this proceeding was filed in the Circuit Court of Kankakee County, against appellee and others attacking the validity of the deed dated December [illegible], from Mrs. Muling to appellee Hunter of the homestead which was kept secret from appellants until he recorded it in September 1919, and among other relief praying an accounting of the $8000 fund which appellee had in his hands. On a hearing of the case the court decreed that said deed was void, and the Supreme Court in Troup et al vs. Hunter et al, 300 Ill. 110, on appeal by one of the defendants, other than Hunter, affirmed the

decree. The decree also required appellee to account for the said sum of $2000.00 which he held for the purpose of using in the event the will was attacked together with interest thereon; that he be given credit for the payment of $300 to a Mrs. Kerr, and that he be entitled to credit for the value of his legal services performed up to the time of the death of Mrs. Huling, for which he had not been paid and for such other items as may be legally established and the matter of his accounting was referred to the master in chancery to state the account.

It appears that on the hearing before the master appellee produced no witnesses but offered in evidence extracts from the certificate of evidence taken in the original proceeding, being portions of the testimony of certain witnesses heard by the Chancellor. The introduction of these extracts was objected to on the ground that the master should see and hear the witnesses themselves. The objection was overruled.

The master allowed appellee credits totalling $2160. as against the $2000.00 trust fund but further found that by the answer of appellee to the bill in the original proceeding, appellee was precluded from denying he owed the executors $711.71. The master's report, to which both sides filed objections was approved by the Chancellor, and appellee was decreed to pay appellants $711.71, from which decree appellants prayed and perfected this appeal.

Appellee insists that under the order of reference it was not necessary to produce the witnesses but that it was in compliance with the order of the court to introduce the testimony taken previously as found in the certificate of evidence. We are of the opinion that the decree was broad enough to authorize the master to take and hear testimony, to examine witnesses and to state the account therefrom and that this was the purpose and intention of the chancellor as indicated in the order of reference. We think the contention of appellants in this respect is correct, and it is one of the principal contentions raised by them in this cause. We have examined the record, however, and are of the opinion appellants are not in a position to raise that question. When the parts of the transcript of the record were offered in evidence by appellee, counsel for appellants made proper objections before the

bonds. The bonds also required appellee to account for the said sum of $8000.00 which he held for the purpose of paying in the event he will was attached together with interest thereon; that he be given credit for the payment of $300 to a Mrs. Lerr, and that he be entitled to credit for the value of his legal services performed up to the time of the death of Mrs. Bulling, for which he had not been paid and for other items as may be legally established and the matter of his accounting was referred to the master in chancery to state the account.

It appears that on the hearing before the master appellee produced no witnesses but offered in evidence extracts from the certificate of evidence taken in the original proceeding, being portions of the testimony of certain witnesses heard by the Chancellor. The introduction of these extracts was objected to on the ground that the master should have heard the witnesses themselves. The objection was overruled.

[illegible] he owed the amounts $711.71. The master's report, to which both sides filed objections was approved by the Chancellor, and appellee was decreed to pay appellants $711.71, from which decree appellants appealed and perfected this appeal.

Appellee insists that under the order of reference it was not necessary to produce the witnesses but that it was in compliance with the order of the court to introduce the testimony taken previously as shown in the certificate of evidence. We are of the opinion that the order was broad enough to authorize the master to take and hear testimony, to examine witnesses and to state the account thereon and that this was the purpose and intention of the chancellor as indicated in his order of reference. We think the contention of appellants in this respect is correct, and it is one of the principal contentions relied upon by them in this cause. We have examined the record, however, and are of the opinion appellants are not in a position to raise that question. Neither the parts of the transcript of the record were offered in evidence by appellee, counsel for appellants made proper objections before the

master. We fail to find where any objedtions were made to the master's report or exceptions before the chancellor raising the question that the master should not have considered the evidence taken before the chancellor.

When a party litigant desires to have the court revise rulings of the master as to the admission or rejection of evidence he should file an objection to the master's report pointing out such grounds with reasonable certainty.

Northern Trust Co. v. Sanford, 308 Ill. 381-388.

A point which is not raised before the master by objection or exception to his report is waived. Sumners v. Heden, 198 Ill. App. 460. It is insisted that the master allowed credits claimed by appellee which should not have been allowed. The record discloses that items of $2160.00 were credited against the fund of $2000.00 but the master held that as appellee had admitted he owed the estate $711.71, he should be compelled to account for this sum.

It is insisted that error was committed in not allowing interest on the fund of $2000.00 as provided in the decree of the chancellor. The bill makes no claim for interest. After an examination of the record in this proceeding it appears that substantial justice has been done. Regardless of the question of interest, in view of the fact that substantial justice has been done, we do not feel that the equities of this cause call for a reversal by reason of this one item alone. When it appears upon an examination of the record that substantial justice has been done between the parties, a judgment should not be disturbed upon appeal. Herdien vs. Jones, 202 Ill. App. 172; Finch vs. Wis. Dairy Farm, 167 Ill. App. 400; Snell vs. Deland, 32 Ill. App.68.

We are not unmindful of the fact that it is argued that a number of credits were allowed by the master that should not have been allowed, but it would not serve any good purpose to consider these items in detail for we deem it sufficient to say that the master properly allowed credits in excess of the difference between $711.71 and the $2000.00

ster. To fail to find where any objections were made to his master's report or exceptions before the chancellor raising the question that the master should not have considered the evidence taken before the [illegible].

When a party litigant desires to have the court review rulings of the master as to the examination or rejection of evidence he should file an objection to the master's report pointing out such grounds with reasonable certainty.

Northern Trust Co. v. Sanford, 308 Ill. 581-588.

A point which is not raised before the master by objection or exception to his report is waived. Summers v. Haden, 198 Ill. App. 650.

It is insisted that the master allowed credits claimed by appellee which should not have been allowed. The record discloses that items of $2100.00 were credited against the fund of $2000.00 but the master found that as appellee had admitted he owed the estate $721.71, he should be compelled to account for this sum.

It is insisted that error was committed in not allowing interest on the fund of $2000.00 as provided in the decree of the chancellor. He will make no claim for interest. After an examination of the record in this proceeding it appears that substantial justice has been done. Regardless of the question of interest, in view of the fact that substantial justice has been done, we do not feel that the equities of this cause call for a reversal by reason of this one item alone. When it appears upon an examination of the record that substantial justice has been done between the parties, a judgment should not be disturbed upon appeal. Hersten vs. Jones, 308 Ill. App. 172; Tinsman vs. Wis. Dairy Farm, 167 Ill. App. 600; Hall vs. Deland, 32 Ill. App.68.

We are not unmindful of the fact that it is argued that a number of credits were allowed by the master that should not have been allowed, but it would not serve any good purpose to consider these items in detail for we deem it sufficient to say that the master properly allowed credits in excess of the difference between $721.71 and the $2000.00

received by the appellee and for this reason the decree of the Circuit Court of Kankakee County will be affirmed.

Affirmed.

received by the appellee and for this reason the decree of the Cir-
cuit Court of Kankakee County will be affirmed.

Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of March in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson
*Clerk of the Appellate Court.*

4 (Cont)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:



Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On  the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

John C. Betz,

Defendant in error,

vs.

Bertha K. Andrews,

Plaintiff in error,

Error to the Circuit Court of Rock Island County.



Partlow, J.

On April 19, 1920, defendant in error, John C. Betz, who was a son-in-law of Frank A. Andrews, filed his bill in the circuit court of Rock Island county, against the widow, legatees and heirs at law of Frank A. Andrews, for the foreclosure of a mortgage. The bill alleged the giving of the mortgage on March 15, 1917, that default had been made thereunder; that after making the mortgage Frank A. Andrews, on September 4, 1917, was married to the plaintiff in error, Bertha K. Andrews; that Frank A. Andrews died on November 19, 1919, leaving the defendants as his legatees and only heirs at law, and leaving to his widow her legal share in the estate; that the widow was in possession of the real estate covered by the mortgage, claimed a homestead in part of it and dower in the remainder, both of which were subject to the mortgage. The prayer was for a foreclosure and that the mortgage be decreed to be a lien superior to the claim of any of the defendants.

All of the defendants except one minor, Frank Andrews, a son, and Bertha K. Andrews, the widow, were defaulted. Bertha K.Andrews filed her answer in which she denied the allegations of the bill and alleged that her right of homestead and dower was superior to the mortgage; denied that the mortgage was executed on the day it bears date, but alleged that it was made subsequent to her marriage with Frank A. Andrews, and was antedated in order to defraud her of her dower and homestead; that it was filed for record subsequent to the death of Frank A. Andrews.

On June 17, 1920, the case being at issue was referred to the

John C. Bete,

Defendant in error,

vs.

Bertha K. Andrews,

Plaintiff in error,

Error to the Circuit Court of Rock Island County.



Mr. Justice Duncan delivered the opinion of the court:

On April 19, 1920, defendant in error, John C. Bete, who was a son-in-law of Frank A. Andrews, filed his bill in the circuit court of Rock Island county, against the widow, legatees and heirs at law of Frank A. Andrews, for the foreclosure of a mortgage. The bill alleged the giving of the mortgage on March 15, 1917, that default had been made thereunder; that after making the mortgage Frank A. Andrews, on September 1, 1917, was married to the plaintiff in error, Bertha K. Andrews; that Frank A. Andrews died on November 12, 1919, leaving the defendants as his legatees and only heirs at law, and leaving to his widow her legal share in the estate; that the widow was in possession of the real estate covered by the mortgage, claimed a homestead in part of it and dower in the remainder, both of which were subject to the mortgage. The prayer was for a foreclosure and that the mortgage be decreed to be a lien superior to the claim of any of the defendants.

All of the defendants except one minor, Frank Andrews, a son, and Bertha K. Andrews, the widow, were defaulted. Bertha K. Andrews filed her answer in which she denied the allegations of the bill and alleged that her right of homestead and dower was superior to the mortgage; denied that the mortgage was executed on the day it bears date, but alleged that it was made subsequent to her marriage with Frank A. Andrews, and was antedated in order to defraud her of her dower and homestead; that it was filed for record subsequent to the death of Frank A. Andrews.

On June 17, 1920, the case being at issue was referred to the

master to take evidence and report his conclusions of law and fact. In September, 1920, Annabel Rogers was granted leave to answer, and the case was again referred to the master. On June 16, 1922, the chancellor ordered the defendants to close their evidence within ten days. Bertha K. Andrews asked various extensions of time thereafter, the time was extended on five or six occasions, and finally the court ordered all defendants to close their evidence by March 17, 1923.

On August 9, 1922, Bertha K. Andrews filed a cross-bill in which she alleged that prior to, and after their marriage, Frank A. Andrews represented to her that the mortgaged property was free from incumbrance; that at that time he was a widower having a number of children; that subsequent to the marriage she expended $4500.00 in making improvements on the property; that she resided on a portion of the premises; that the mortgage was not recorded until after the death of her husband; that Betz had knowledge of her intention to make the improvements and knew she made them, and he remained silent and failed to inform her of the mortgage. She prayed that a lien for the improvements be decreed to be prior to the mortgage.

All of the defendants to the cross-bill were defaulted but the default was later set aside. Some of the defendants to the cross-bill demurred and the demurrer was sustained. Betz filed an answer to the cross-bill.

On March 17, 1923, the master made his report. There had been very little, if any, evidence taken under the cross-bill, and apparently very little effort had been made to take evidence. The master found that Frank A. Andrews, during his lifetime, became indebted to Betz and executed three promissory notes, one for $5000.00 dated January 1, 1905, due in one year, one for $7000.00 dated January 1, 1906, due in two years, and the third dated March 15, 1917, for $3000.00 due in six months, each to bear interest at 6%. On the first note there was an endorsement of interest paid May 1, 1910. To secure these notes, Andrews, on March 15, 1917, executed a mortgage

to Betz on the real estate described in the bill, consisting of two pieces in the City of Rock Island, one of which was the homestead of Andrews. The master found that Bertha K. Andrews had expended $4500.00 in repairs on the homestead property; that Betz was estopped to assert that his mortgage was superior to the lien for this expenditure and that his claim should be postponed to the claim of Bertha K. Andrews to the extent of $4500.00; that appellant's mortgage was superior to the homestead rights of Bertha K. Andrews.

On April 7, 1923, Betz filed objections to the master's report and on the same date Bertha K. Andrews filed thirty-six objections thereto. No claim was made that the cross-bill was ready for hearing, nor was any objection made to the hearing on the original bill before the cross-bill was ready. On hearing of the objections, it was claimed by Betz that the master's finding that Bertha K. Andrews had expended $4500.00 in improvements was not proper under the pleadings, and the master sustained this objection and reformed his report so as to omit that finding. The master then filed a new report, to which Bertha K. Andrews filed exceptions, but no exception was filed to the failure on the part of the master to find that she had expended money in improvement, nor that the master had made his finding on the original bill and not on the cross-bill. She excepted to the finding that Betz's mortgage was superior to her homestead and dower rights. This last exception was sustained by the chancellor and the final decree found that the mortgage was subject to her dower and homestead rights. The final decree was entered at the May Term, 1923, on June 17, 1923.

On July 16, 1923, Bertha K. Andrews filed a motion for leave to file an amended answer to the original bill. This amended answer, among other things, denied the indebtedness; denied that Andrews executed the three notes in question; alleged that the mortgage and notes were given without consideration; that Betz was advised of the proposed marriage and gave no information of his unrecorded mortgage; that the mortgage was given and accepted for the purpose of defrauding any person to whom Andrews might thereafter be married; that

to Beta on the real estate described in the bill, consisting of two pieces in the city of Rock Island, one of which was the homestead of Andrews. The master found that Bertha K. Andrews had expended $4500.00 in repairs on the homestead property; that Beta was assigned [illegible] assert that his mortgage was superior to the lien for this expenditure [illegible] to the extent of $4500.00; that appellant's mortgage was [illegible] for to the homestead rights of Bertha K. Andrews.

On April 7, 1928, Beta filed objections to the master's report and on the same date Bertha K. Andrews filed thirty-six objections thereto. No claim was made that the cross-bill was ready for hearing, nor was any objection made to the hearing on the original bill before the cross-bill was ready. On hearing of the objections, it was claimed by Beta that the master's finding that Bertha K. Andrews had expended $4500.00 in improvements was not proper under the pleadings, and the master sustained this objection and returned his report so as to omit that finding. The master then filed a new report, to which Bertha K. Andrews filed exceptions, but no exception was filed to the failure on the part of the master to find that she had expended money in improvement, nor that the master had made his finding on the original bill and not on the cross-bill. The exceptions to the finding that Beta's mortgage was superior to her homestead and dower rights. This last exception was sustained by the chancellor and the final decree found that the mortgage was subject to her dower and homestead rights. The final decree was entered at the May Term, 1928, on June 17, 1928.

On July 16, 1928, Bertha K. Andrews filed a motion for leave to file an amended answer to the original bill. This amended answer, among other things, denied the indebtedness; denied that Andrews [illegible] the three notes in question; alleged that the mortgage and notes were given without consideration; that Beta was advised of the proposed marriage and gave no information of his unrecorded mortgage; that the mortgage was given and accepted for the purpose of defrauding any person to whom Andrews [illegible] thereafter be married; . .

Andrews represented to his wife prior to their marriage that said property was free from incumbrance; that relying on said statement, she had improved the same, expending $4500.00; that she was deceived and misled by the silence of said mortgagee; that the mortgage was in fraud of her dower, homestead and marital rights. The court denied the motion for leave to file the amended answer. The decree found there was $24,634.52 due Betz upon his mortgage and the premises were ordered sold subject to the homestead and dower rights of the widow.

The Master sold the premises and made his report to the next term of court. There was a deficiency judgment of $9547.66, which was to be paid by the executor in due course of administration. Bertha K. Andrews filed objections to the report of sale and attempted to get the court not to approve the sale until the final hearing on the cross-bill. This the court refused to do, an order was entered approving the sale, and the cross-bill was dismissed.

As ground for reversal, it is urged that the court was in error in sustaining the demurrer to the cross-bill; in refusing the motion of Bertha K. Andrews for leave to file an amended answer; in sustaining the master in refusing to admit proper evidence offered by the complainant in the cross-bill; in refusing to order Betz to produce papers and records of Andrews showing Betz's financial transaction after the death of Andrews; that there was a variance between the bill and the proof as to the time of the execution of the notes; that the evidence did not show there was any consideration for the notes, or that they were properly executed; erred in refusing to decree the mortgage to be subject to the widow's one-third interest in the personal property as well as to the dower and homestead; erred in refusing to decree a lien in favor of the widow for money advanced for permanent improvements.

~~Before considering these various objections, we desire to say that we have had considerable difficulty in determining the issues in this~~

represented to him when prior to their marriage that said property was free from encumbrance; that relying on said statement, he improved the same, expending $600.00; that she was deceived [illegible] by the silence of said mortgagee; that the mortgage was [illegible] of her dower, homestead and marital rights. The court [illegible] motion for leave to file the amended answer. The decree [illegible] there was $24,554.82 due Bets upon his mortgage and the premises [illegible] ordered sold subject to the homestead and dower rights of the [illegible].

The [illegible] court. There was a deficiency judgment of $9847.66, which [illegible] paid by the executor in due course of administration. [illegible] Andrews filed objections to the report of sale and attempted [illegible] the court not to approve the sale until the final hearing [illegible] the cross-bill. This the court refused to do, an order was entered [illegible].

[illegible] Andrews for leave to file an amended answer; in sustaining the master in refusing to admit proper evidence offered by the [illegible] in the cross-bill; in refusing to order Bets to produce [illegible] and records of Andrews showing Bets's financial transaction [illegible] the death of Andrews; that there was a variance between the [illegible] and the proof as to the time of the execution of the notes; that the evidence did not show there was any consideration for the notes, or that they were properly executed; error in refusing to decree the [illegible] to be subject to the widow's one-third interest in the personal property as well as to the dower and homestead; error in refusing to decree a lien in favor of the widow for money advanced for [illegible] by [illegible].

~~case. The record is voluminous, is not very accurately abstracted, and the abstract is not properly indexed. The plaintiff in error filed a brief consisting of 107 pages. The defendants in error filed their brief and a reply brief was then filed by the plaintiff in error. Later a motion was made by defendant in error to strike plaintiff in error's brief from the file, which motion was sustained by this court and the brief stricken. Afterwards plaintiff in error filed a new brief but defendants in error did not reply thereto and then plaintiff in error filed a reply brief to her own brief. As a result this court has had no brief and argument on behalf of the defendant in error answering or attempting to answer the brief of plaintiff in error. On account of this condition of the record, we have been greatly hampered in our examination of the case and have been compelled to do a vast amount of work which we should not have been compelled to do. Notwithstanding this condition of the record, briefs and arguments, we have tried to reach a conclusion which is justified under the law and the facts.~~

On account of the views which we entertained it will not be necessary to consider in detail each of the errors assigned. Bertha K. Andrews, the widow, is the sole plaintiff in error and is the only one making complaint of the decree. None of the other heirs of Frank A. Andrews are making any objections. The rights of plaintiff in error may be disposed of under two heads -- first, whether the mortgage of Betz is subject to the homestead and dower of the widow, and second, whether the decree was in error in not giving her a prior lien for $4500.00 which she claims to have expended for improvements. These are the only questions raised by her answer to the original bill, or by her cross-bill. Outside of the expenditure for improvements, the only right she had as a result of her marriage to Andrews was her right of homestead and dower in his estate. The decree provides that the lien of the mortgage is subject to her dower and homestead rights. By this decree she obtained exactly what she

asked for in her answer to the original bill, and exactly what she would have been entitled to receive if there had been no mortgage and no attempt to foreclose it. If she obtained under the decree, as far as her homestead and dower rights were concerned, exactly what she was entitled to under the law in case no mortgage had been executed, then she has no right to complain of any error which the chancellor may have committed. Lagger vs. Mutual Union Association, 146 Ill. 283; Drainage District vs. Highway Commissioners, 220 Ill. 176; Comstock vs. Redmond, 252 Ill. 522. We hold there was no error in the decree, insofar as her dower and homestead rights were concerned.

The next question is whether the decree was erroneous in not providing for a prior lien of $4500.00 for improvements. A bill of foreclosure was filed April 19, 1920. On May 17, 1920, plaintiff in error filed her answer which denied the allegations of the bill, set up her homestead and dower but made no reference to the $4500.00. On June 17, 1920, the case was referred to the master where it was pending for almost two years during which time evidence was taken. It is apparent there was great delay in taking the evidence. On June 16, 1922, on motion of Betz, the chancellor ordered plaintiff in error to close her evidence before the master in ten days. The evidence was not closed within the time specified and the time was further extended five times upon request of plaintiff in error, the last extension being September 25, 1922. Twice after that date plaintiff in error asked for an extension but the motions were denied. Finally, on March 12, 1923, the court ordered plaintiff in error to close her evidence on March 17, 1923. The chancellor was very liberal in giving plaintiff in error every opportunity to present her evidence and if she did not take advantage of these opportunities, she is not now in a position to complain. The master made his report March 17, 1923, but the final decree was not entered until June 17, 1923. On August 19, 1922, plaintiff in error filed her cross-bill, two years and three months after she filed her answer to the original bill and

asked for in her answer to the original bill, and exactly what she would have been entitled to receive if there had been no mortgage and no attempt to foreclose it. If she obtained under the decree, as for her homestead and dower rights were concerned, exactly what she was entitled to under the law in case no mortgage had been executed, then she has no right to complain of any error which the master may have committed. Dagger vs. Mutual Union Association, 28 Ill. 288; Drainage District vs. Railway Commissioners, 280 Ill. 171; Comstock vs. Redmond, 282 Ill. 522. We hold there was no error in the decree, insofar as her dower and homestead rights were concerned.

Next question is whether the decree was erroneous in not allowing for a prior lien of $6500.00 for improvements. A bill of review herein was filed April 19, 1920. On May 17, 1920, plaintiff in error filed her answer which denied the allegations of the bill, as to her homestead and dower but made no reference to the $6500.00. On May 17, 1920, the case was referred to the master where it was pending for almost two years during which time evidence was taken. [illegible] the evidence. On [illegible] 16, 1922, [illegible] error to close her evidence before the master in ten days. The evidence was not closed within the time specified and the time was further extended five times upon request of plaintiff in error, the last extension being September 26, 1922. Twice after that date plaintiff in error asked for an extension but the motions were denied. Finally, on March [illegible], 1923, the court ordered plaintiff in error to close her evidence on March 17, 1923. The chancellor was very liberal in giving plaintiff in error every opportunity to present her evidence and if she did not take advantage of these opportunities, she is not now in a position to complain. The master made his report March 1, 1923, but the final decree was not entered until June 17, 1923. On August 19, 1923, plaintiff in error filed her cross-bill, two years and three months after she filed her answer to the original bill and

she then, for the first time, alleged that she had expended $4500.00 for improvements. On September 18, 1922, while on the witness stand in behalf of Annabelle Rogers, plaintiff in error testified for the first time to a limited extent concerning these improvements, but at no other place in the record is our attention called to any other testimony on that subject, although the record embraces about one thousand pages. On June 16, 1923, the day before the decree was entered, the plaintiff in error asked leave to amend her answer to the original bill, which motion was denied. In this amended answer she set up substantially the same facts with reference to the improvements as were alleged in her cross-bill. When the master's report was filed, plaintiff in error filed exceptions and when the master amended his report she again filed exceptions. These exceptions are many and lengthy but in none of them is there any complaint that the original bill was heard before the cross-bill. The decree was rendered upon the original bill and not upon the cross-bill. There was no allegation in the original bill, or in the answer of the plaintiff in error thereto, which raises any question concerning improvements. That question was not properly before the court upon the original bill and answer. The plaintiff in error was not diligent in getting her pleadings in shape to raise that question at the time the final decree was entered, and for that reason the chancellor was not in error in failing to permit her at that late date to amend her answer to the original bill. There should be considerable lattitude allowed in the filing of amendments but that right, however, is governed by the facts of the particular case and rests in the sound discretion of the trial court. This case had been pending over three years before the motion was made. Plaintiff in error knew all of the time that she claimed for improvements. We hold that the chancellor under the facts properly refused to permit plaintiff in error to amend her answer.

After the sale had been made and the report thereof filed, plaintiff in error sought to have the approval of the sale postponed

[illegible] improvements. On September 18, 1928, while on the witness stand in behalf of Annabelle Rogers, plaintiff in error testified for the first time to a limited extent concerning these improvements, but at no other place in the record in our attention called to any other testimony on that subject, although the record embraces about [illegible] pages. On June 10, 1928, the day before the decree was entered, the plaintiff in error asked leave to amend her answer to the original bill, which motion was denied. In this amended answer she set up substantially the same facts with reference to the improvements as were alleged in her cross-bill. When the master's report was filed, plaintiff in error filed exceptions and when the master amended his report she again filed exceptions. These exceptions are many and lengthy but in none of them is there any complaint that the original bill was heard before the cross-bill. The decree was rendered upon the original bill and not upon the cross-bill. There was no allegation in the original bill, or in the answer of the plaintiff in error thereto, which raised the question of improvements. The chancellor was not in specific error in [illegible] upon the original bill and answer. The plaintiff in error was not diligent in getting her pleadings in shape to raise that question at the time the final decree was entered, and for that reason the chancellor was not in error in failing to permit her at that late date to amend her answer to the original bill. There should be considerable latitude allowed in the filing of amendments but that right, however, is governed by the facts of the particular case and rests in the sound discretion of the trial court. This case had been pending over three years before the motion was made. Plaintiff in error knew all of the time that she claimed for improvements. We hold that the chancellor under the facts properly refused to permit plaintiff in error to amend her answer.

After the sale had been made and the report thereof filed, plaintiff in error sought to have the approval of the sale postponed

until after the hearing on the cross-bill which motion the chancellor denied, and an order was entered not only approving the sale but also dismissing the cross-bill, and this ruling is assigned as error. The cross-bill was not a part of the original proceedings and did not depend upon the original bill. By filing a cross-bill, a suit will not necessarily be delayed until after a cross-bill is at issue. The two cases may be tried together if they are at issue and ready to be heard. If both are not at issue and are not ready to be heard they may be tried separately. It has been held that it is not error to proceed to a hearing on an original bill before a cross-bill is ready to be heard. This is a question which depends upon the facts of the particular case and is within the sound discretion of the chancellor. Myers vs. Manny, 83 Ill. 211; Davis vs. American & Foreign Christian Union, 100 Ill. 513; Bradford vs. Bennett, 48 Ill. App. 145; Dorman vs. Buckley, 119 Ill. App. 523. If the complainant in a cross-bill desires a stay of proceedings he should make application for that purpose which, when made at the proper time, or when the furtherance of justice requires such a bill to be filed, will usually be granted. If the defendant desires to file a cross-bill, he should do so without delay and have the same at issue so as to be heard with the original bill. Beauchamp vs. Putnam, 34 Ill. 378; Quick vs. Lemon, 105 Ill. 578; Fread vs. Fread, 165 Ill. 228. Where a cross-bill is filed but no effort is made to get it ready for hearing at the time of the hearing on the original bill, and the parties willingly go to a hearing upon the original bill, the cross-bill may be regarded as having been abandoned. Purdy vs. Henslee, 97 Ill. 389; McGillis vs. Hogan, 190 Ill.176. Not only must the party who desires to file a cross-bill act diligently but where there is delay in filing the cross-bill until after the suit is tried and no attempt is made to have it heard until after the master's report has been prepared ready to be submitted to the court, and the parties go to a hearing on the master's report without

[illegible] after the hearing on the cross-bill which motion the examiner denied, and an order was entered not only approving the sale but also dismissing the cross-bill, and this ruling is assigned as error. The cross-bill was not a part of the original proceedings and did not depend upon the original bill. By filing a cross-bill, a suit will not necessarily be delayed until after a cross-bill is at issue. The two cases may be tried together if they are at issue and ready to be heard. If both are not at issue and are not ready to be heard they may be tried separately. It has been held that it is not error to proceed to a hearing on an original bill before a cross-bill is ready to be heard. This is a question which depends upon the facts of the particular case and is within the sound discretion of the chancellor. Myers vs. Kenny, 68 Ill. 211; Davis vs. Western & Southern Mutual, 100 Ill. 316; Radford vs. Kenney, 46 Ill. App. 148; Dorsey vs. Dooley, 112 Ill. App. 582. If the complainant in a cross-bill desires a stay of proceedings he should make application for that purpose which, when made at the proper time, [illegible] will be granted. If [illegible] as like a cross-bill, he should do so without delay and have the case at issue so as to be heard with the original bill. Somerville vs. Putnam, 54 Ill. 278; Smith vs. Lemon, 105 Ill. 376; Kread vs. Kread, 166 Ill. 288. Where a cross-bill is filed but no effort is made to get it ready for hearing at the time of the hearing on the original bill, and the parties willingly go to a hearing upon the original bill, the cross-bill may be regarded as having been abandoned. Purdy vs. Donahue, 97 Ill. 488; Moulitis vs. Yoman, 190 Ill.176. It only must the party who desires to file a cross-bill act diligently but where there is delay in filing the cross-bill until after the suit is tried and no attempt is made to have it heard until after the master's report has been prepared ready to be submitted to the court, and the parties go to a hearing on the master's report without

making an application for delay ~~in~~ until after the cross-bill can be heard, it is proper for the chancellor to proceed to the final hearing upon the original bill and ignore the cross-bill. Kelsly vs. Clausen, 257 Ill. 402.

From an examination of all the evidence we are impressed with the fact that there was great delay in this case from beginning to end. There is very little, if any evidence under the cross-bill, although the record is very voluminous on almost every other feature of the case. The plaintiff in error waited until after there was a report by the master on the original bill, after voluminous exceptions had been heard on that report, and after the chancellor had announced the decree, before any steps were taken to have a hearing either on the cross-bill, or under an amended answer to the original bill. For that reason the chancellor was justified in holding that the cross-bill had been abandoned and he was not in error in dismissing the same.

As before stated the only evidence to which our attention has been called concerning the question of money expended for improvements is found in the evidence of plaintiff in error while she was on the witness stand in behalf of Annabelle Rogers. Plaintiff in error insists that this evidence was sufficient to justify the chancellor in entering a decree for $4500.00 as a lien superior to the mortgage. Section 2 of the statute on evidence and depositions provides that no party, in any civil action, shall be allowed to testify on his own motion when any adverse party sues or defends as executor or administrator, heir, legatee, or devisee, of a deceased person. All the parties to the suit, except Betz, were heirs, or devisees of Andrews. The plaintiff in error was seeking to establish her claim against the estate of Andrews, and while indirectly she sought to have the $4500.00 declared to be a lien prior to the mortgage, yet in effect the heirs of Andrews were the parties who would suffer by reason of such a decree being entered. Plaintiff in error was a witness. Insofar as her testimony affects the interests of the

heirs and devisees of Andrews, she was incompetent. There is testimony as to conversations which she had with Betz which are competent, but when she attempted to testify to the amount she expended for improvements, she was testifying against the heirs of Andrews and under the statute her evidence was not competent. For that reason there is no evidence as to the amount of improvements which she may have made.

Even concede that the evidence of plaintiff in error with reference to these improvements was competent against both Betz and the heirs of Andrews, we do not think the testimony in that respect goes far enough to entitle plaintiff in error to a decree. The substance of her testimony is that she spent $4500.00 in improvements, and that Betz knew she was making improvements and was paying for them. This is the extent of her testimony. She did not testify she made them with the knowledge, consent, or at the request of her husband, or that he directly or by implication promised to repay her therefor, or that she had not been paid for all improvements which she made. The mere fact that she expended money, either as a volunteer, or otherwise, would not be sufficient, and it is indispensable to her case, in order that she be entitled to a lien, that she prove she had not been repaid therefor. There is no such evidence in the record.

Under all the facts we find that the decree was correct and it will be affirmed.

Decree affirmed.

[illegible] and Davis [illegible] of Andrews, she was incompetent. There is testimony as to conversations which she had with Davis which are competent, but when she attempted to testify to the amount and expended for improvements, she was [illegible] heirs of Andrews and [illegible] ent. For that reason there is no evidence as to the amount of improvements which she may have made.

Even conceds that the evidence of plaintiff in error with refer-ence to these improvements was competent against both Davis and the heirs of Andrews, we do not [illegible] testimony in that respect [illegible] far enough to entitle [illegible] of her testimony is [illegible] at $4000.00 in improvements, [illegible] Davis knew she was making improvements and was paying for them. [illegible] is the extent of her testimony. She did not testify she made [illegible] with the knowledge, consent, or at the request of her husband, or that he directly or by implication promised to repay her therefor, or [illegible] improvements which she made. The [illegible] would not be sufficient, [illegible] it is [illegible] that she be entitled to a lien, that she prove she had not been repaid therefor. There is no such evidence in the record.

Under all the facts we find that the decree was correct and it will be AFFIRMED.

See 91 [illegible].

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of March in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson
*Clerk of the Appellate Court.*

7 (Oct)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:



Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On JAN the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of
Illinois, on the relation of
Dorothy Kness,
appellee,
vs.
Lloyd Queckboerner,
appellant,

236 I.A. 648

Appeal from the County Court
of Carroll County.

Partlow, J.

Appellant, Lloyd Queckboerner, was found guilty in the county court of Carroll county, of being the father of a bastard child born to the relatrix, Dorothy Kness, and from a judgment entered upon the verdict an appeal has been prosecuted to this court.

It is urged that the verdict is contrary to the evidence. At the time of the alleged intercourse, appellant was twenty-eight years old and relatrix was seventeen years old. She testified she first went with appellant about March 12, 1922, and about three days later, on or about March 14 or 15, 1922, they had intercourse at the home of John Doden, her brother-in-law. They later had intercourse about April 12 at the home of Charles Miller, again about April 15, and on several other occasions, the times and places not being fixed. About April 12 or 15, she told appellant she was pregnant. She testified appellant told her to see Dr. Calkins and be examined, that he wanted to get rid of it. She was examined by Dr. Calkins the latter part of July, 1922, and he told her she had been pregnant about five months. She testified appellant said he would marry her and suggested that she go to Iowa and get rid of the child. She went to Iowa about July 20, and remained until August 15. She next saw appellant about September 9. On September 10, her father learned of her condition and went to see appellant but did not find him. On September 11, appellant went to Iowa where he resided until the latter part of January, 1923, when he was arrested. Dr. E. M. Hartfield testified he attended relatrix on November 30, 1922, when the child was

The People of the State of
Illinois, on the relation of
Dorothy Hess,
appellee,

vs.

Lloyd Queckboerner,
appellant.

236 I.A. 548

Appeal from the County Court
of Carroll County.

Mr. [illegible]

Appellant, Lloyd Queckboerner, was found guilty in the county of Carroll county, of being the father of a bastard child born to the relatrix, Dorothy Hess, and from a judgment entered upon the verdict an appeal has been prosecuted to this court.

It is urged that the verdict is contrary to the evidence. At the time of the alleged intercourse, appellant was twenty-eight years old and relatrix was seventeen years old. She testified she first went with appellant about March 12, 1922, and about three days later, on or about March 14 or 15, 1922, they had intercourse at the home of John Doden, her brother-in-law. They later had intercourse about April 12 at the home of Charles Miller, again about April 15, and on several other occasions, the times and places not fixed. About April 12 or 15, she told appellant she was pregnant. She testified appellant told her to see Dr. Collins and he examined, that he wanted to get rid of it. She was examined by Dr. Collins the latter part of July, 1922, and he told her she had been pregnant about five months. She testified appellant said he would marry her and suggested that she go to Iowa and get rid of the child. She went to Iowa about July 20, and remained until August 15. She next saw appellant about September 3. On September 10, her father learned of her condition and went to see appellant but did not find him. On September 11, appellant went to Iowa where he resided until the latter part of January, 1923, when he was arrested. Dr. [illegible] M. Leatfield testified he attended relatrix on November 20, 1922, when the child was

born; that it was normal and fully developed; that the usual period of gestation was 280 days, but there might be from ten to twelve days difference either way; that it might be as long as 300 days, and might be as short as 259 days. Upon cross-examination, he testified that not very many normal children are born within 260 days, that it is very rare but possible, but not probably; that he saw nothing about this child that indicated it was not carried the full 280 days. Mrs. Miller testified the relatrix was at her home during April and was there until sometime in June, and appellant called upon her while she was there. John Doden, the brother-in-law of relatrix, testified she was at his house sometime in March, 1922, and appellant spent different evenings with her; that she was there about one week before election and one week after election. Appellant testified he first went with relatrix about April 5, 1922, and had intercourse with her on that night at the Doden's home; that he had intercourse with her twice after that, once at Miller's and once at Doden's. He said he went with her during May and June. He denied he had intercourse with her in March, 1922. He testified he told her he would marry her if she blamed him and she said she could not blame him as there were too many others. She said she would not marry him. He was married August 21, 1922, in Iowa. Mrs. George Manning, a sister of appellant, testified that appellant visited her in Davenport, Iowa, about March 14, 1922; that he came on Monday or Tuesday of that week and remained until the next Saturday. She remembered this date because she had purchased a new dining room set and it had been ordered on Monday or Tuesday of the week before appellant was to come. Appellant did not testify to any facts concerning his visit to Iowa as testified to by his sister. Dr. Calkins testified that relatrix called at his office for examination and said she thought she was about a month and a half pregnant. Upon examination he told her she had been pregnant between four and five months. He testified she asked him to get rid of the child and he refused, and gave her no medicine; that appellant never talked to

[illegible] it was normal and fully developed; that the usual period of [illegible] difference either way; that it might be as long as 300 days, [illegible] might be as short as 250 days. Upon cross-examination, he testified that not very many normal children are born within 250 days, that it is very rare but possible, but not probably; that he saw [illegible] child that indicated it was not carried the full [illegible]. Mrs. Miller testified the relatrix was at her home during [illegible] and was there until sometime in June, and appellant called [illegible] while she was there. John Doden, the brother-in-law of [illegible], testified she was at his home sometime in March, 1922, [illegible] different evenings with her; that she was [illegible] one week before election and one week after election. Appellant [illegible] intercourse with her twice after that, once at Tiffin's and [illegible]'s. He said he went with her during May and June. He [illegible] had intercourse with her in March, 1922. He testified he [illegible] could [illegible] him as there were too many others. She said she would not [illegible]. He was married [illegible] 21, 1922, in Iowa. Mrs. Teorge [illegible], a sister of appellant, testified that appellant visited her in Davenport, Iowa, about March 14, 192 ; that he came on Monday [illegible] of that week and remained until the next Saturday. She [illegible] this date because she had purchased a new dining room [illegible] it had been ordered on Monday or Tuesday of the week before [illegible] was to come. Appellant did not testify to any facts con- [illegible]

[illegible] He testified she asked him to get rid of the child and [illegible], and gave her no medicine; that appellant never talked to

him about getting rid of the child, but the father of the relatrix asked him to commit an abortion which he refused to do. Arthur Faucett, a farm hand employed by a brother of the appellant, testified he had intercourse with the relatrix on April 1, 1922. He remembered the date because it was April Fool's day. He testified that the only April Fool's day he remembers was in 1922. This act of intercourse as testified to by Faucett was denied by the relatrix.

The question is whether or not this evidence was sufficient to sustain the verdict of the jury. It is a general rule of law that the exact day on which the child was begotten, is immaterial, and though the relatrix might be mistaken as to the date, yet if the jury believe from the evidence that the defendant was the father of the child, they should find him guilty, as it matters not at what time he became so. Holcomb vs. People, 79 Ill. 409; Ross vs. People, 34 Ill. App. 21; Beck vs. People, 115 Ill. App. 19. A verdict in a bastardy proceeding will not be disturbed on account of being against the weight of the evidence where the evidence is conflicting and there are no serious errors in the rulings of the court upon evidence or instructions. Connelly vs. People, 81 Ill. 379; Eastman vs. People, 93 Ill. 112; People vs. Kirby, 199 Ill. App. 91; People vs. Stromberg, 202 Ill. App. 11. In People vs. Wenglarz, 201 Ill. App. 524, it was held that a verdict finding that the defendant was the father of the child should be sustained where the defendant did not deny that he had intercourse with the relatrix, and where the evidence offered by him tending to show that other men had intercourse with her about the time of conception, was denied by relatrix. In People vs. Pike, 34 Ill. App. 112, it was held that the period of gestation was from 260 to 308 days and the ~~average~~ average was 276 days.

There were 260 days from March 15, the date the relatrix testified the act of intercourse took place, to November 30, the date the child was born. There were 243 days from April 1, the date Faucett testified he had intercourse with relatrix, to November 30, the date the child was born. There were 239 days from April 5, the date

in about getting rid of the child, but the father of the relatrix asked him to commit an abortion which he refused to do. Arthur Bennett, a farm hand employed by a brother of the appellant, testified he had intercourse with the relatrix on April 1, 1922. He remembered the date because it was April Fool's day. He testified that the only April Fool's day he remembers was in 1922. This not intercourse as testified to by Bennett was denied by the relatrix.

The question is whether or not this evidence was sufficient to sustain the verdict of the jury. It is a general rule of law that the exact day on which the child was begotten, is immaterial, and though the relatrix might be mistaken as to the date, yet if the jury believe from the evidence that the defendant was the father of the child, they should find him guilty, as it matters not at what time he became so. Holcomb vs. People, 70 Ill. 409; Rose vs. People, 14 Ill. App. 21; Beck vs. People, 115 Ill. App. 19. A verdict in a bastardy proceeding will not be disturbed on account of being against the weight of the evidence where the evidence is conflicting and there are no serious errors in the rulings of the court upon evidence or instructions. Connelly vs. People, 81 Ill. 279; Bentson vs. People, 98 Ill. 112; People vs. Kirby, 199 Ill. App. 91; People vs. Stromberg, 202 Ill. App. 11. In People vs. Wenglere, 201 Ill. 524, it was held that a verdict finding that the defendant was the father of

not deny that he had intercourse with the relatrix, and where the evidence offered by him tending to show that other men had intercourse with her about the time of conception, was denied by relatrix. People vs. Pike, 34 Ill. App. 112, it was held that the period of gestation was from 260 to 308 days and the ~~verdict~~ was 276 days. There were 260 days from March 15, the date the relatrix testified the act of intercourse took place, to November 20, the date the child was born.

testified he had intercourse with relatrix, to November 20, the date child was born. There were 229 days from April 5, the date

appellant testified he had intercourse with the relatrix, and November 30, the day the child was born. Under appellant's theory, Faucett could not be the father of the child, and appellant, if he had the first intercourse on April 5, was not the father. Under all the facts and circumstances it was the duty of the jury to determine which witnesses were testifying to the truth and to determine the weight to be given to the testimony of all the witnesses in the case. In People vs. Stromberg, supra, it was held that in a bastardy proceeding where the defendant denied the paternity of the child and relied on an alibi, and called personal friends and relatives to establish the alibi, a finding that he was the father of the child would not be held to be manifestly against the weight of the evidence, for the reason that the weight of the evidence depended upon the superior facilities of the jury and trial court for determining the credibility of the witnesses by seeing and hearing them, and observing their manner of testifying. If the jury believed the testimony of the relatrix and did not believe the testimony of appellant, Mrs. Manning, and Faucett, they were justified in returning a verdict against appellant. This court cannot reverse a verdict of a jury unless it is manifestly against the weight of the evidence, and we do not feel justified in disturbing this verdict upon the ground that it is manifestly against the weight of the evidence.

The third instruction given on behalf of appellee told the jury that the exact date of the conception need not be proved, but that it was sufficient if intercourse was established within the period of the longest and shortest time of gestation as shown by the evidence. It is conceded that this instruction states a correct rule of law, but it is claimed it is not applicable to the facts proven; that where the acts complained of are few, and where an alibi has been shown by unimpeached witnesses, that this instruction is vicious and does not clearly state the law applicable to the facts; that in this case the evidence shows there was only one possible date of intercourse whereby the child could have been

satisfied he had intercourse with the relatrix, and
the day the child was born. Under appellant's theory,
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the first intercourse on April , was not the father. Under
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It is claimed it is not applicable to the facts
where the sole complainant of are few, and where no
been shown by unimpeached witnesses, that this test
and does not clearly state the law applicable to
this case the evidence shows there was only one

conceived, and for that reason the giving of this instruction in effect told the jury that the date of conception need not be proved, but all that was necessary was to find that he had intercourse with relatrix within the longest and shortest period of gestation as shown by the evidence. In support of this contention, Matteson vs. People, 132 Ill. App. 66, is cited. The facts in that case are very different from the facts in this case. In that case the prosecuting witness testified there was but one act of intercourse, so the date of such occurrence was very material, in view of the fact that the child was born August 13, and was conceived on February 4, or February 11. The evidence of doctors in that case was that a child born in so short a period of time would not live without artificial assistance. In this case relatrix testified to the first act of intercourse on March 14 or 15, while the appellant admits the first act was on April 5. The child was born November 30, so that under the testimony of relatrix eight months and twenty days elapsed, while under the appellant's testimony there were eight months lacking one day. In People vs. Hill, 152 Ill. App. 79, the defendant denied having sexual intercourse. Under the evidence there was but one act of intercourse. Defendant said the picnic when it occurred was on August 26, 1907, but relatrix claimed it took place the early part of August. The child was born May 1, 1908, being only 247 days. The court held that it could not on these facts say that the verdict finding the defendant to be the father of the child was against the preponderance of the evidence, or that it was impossible for him to be the father of a child born after such a period of gestation, even assuming the sexual act to have occurred on August 26. Even if the third instruction was bad, appellant has no ground for complaint for the reason that the seventh instruction offered by him and refused by the court was substantially the same as the third given. He will not be heard to complain of an instruction given by the court when he offers one substantially to the same effect.

with relatrix within the longest and shortest period of gestation as shown by the evidence. In support of this contention, [illegible] v. People, 182 Ill. App. 66, is cited. The facts in that case are very different from the facts in this case. In that case the prosecuting witness testified there was but one act of intercourse, so the date of such occurrence was very material, in view of the fact that the child was born August 12, and was conceived on [illegible] 4, or February 11. The evidence of doctors in that case was that a child born in so short a period of time would not live without artificial assistance. In this case relatrix testified to the first act of intercourse on March 14 or 15, while the defendant admits the first act was on April 5. The child was born [illegible] 20, so that under the testimony of relatrix eight months and twenty days elapsed, while under the appellant's testimony there were eight months lacking one day. In People vs. Hill, 182 Ill. App. 79, the defendant denied having sexual intercourse. Under the evidence there was but one act of intercourse. Defendant [illegible] it took place the early part of August. The child was born [illegible]

[illegible] father of the child was against the preponderance of the evidence, or that it was impossible for him to be the father of a child born after such a period of gestation, even assuming the [illegible] act to have occurred on August 26. Even if the third instruction was bad, appellant has no ground for complaint for the reason that the seventh instruction offered by him and refused by the court was substantially the same as the third given. We will not be heard to complain of an instruction given by the court when [illegible] one substantially to the same effect.

The fourth instruction on behalf of the appellee enumerated the various elements which constitute the preponderance of the evidence, and concluded as follows: "And from all the evidence, facts and circumstances determine upon which side is the weight or preponderance of the evidence." Appellant insists that this last clause, in effect, tells the jury that they must find upon which side is the preponderance of the evidence. We have read this instruction carefully and when considered as a whole it is not capable of the interpretation placed upon it by appellant and was for that reason not erroneous. Complaint is made of the refusal of the court to give the seventh instruction offered by appellant. This instruction was properly refused because it singles out a particular witness and calls attention to that part of the evidence. This has been condemned in many cases.

We find no reversible error, and the judgment will be affirmed.

Judgment affirmed.

The fourth instruction on behalf of the appellee enumerated various elements which constitute the preponderance of the evidence, and concluded as follows: "And from all the evidence, facts and circumstances determine upon which side is the weight or preponderance of the evidence." Appellant insists that this clause, in effect, tells the jury that they must find upon which side is the preponderance of the evidence. We have read this instruction carefully and when considered as a whole it is capable of the interpretation placed upon it by appellant and that reason not erroneous. Complaint is made of the refusal of the court to give the seventh instruction offered by appellant. This instruction was properly refused because it singles out a particular witness and calls attention to that part of the evidence. This has been condemned in many cases.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of March in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson
*Clerk of the Appellate Court.*

10 (Oct)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:



Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Arthur W. Dun,

Appellee,

vs.

Fred Sippel, doing business under the name and style of F. Sippel Auto Company,

Appellant,

236 I.A. 648

Appeal from the Circuit Court of Will County.

Partlow, J.

Appellee, Arthur W. Dun, began suit in the circuit court of Will County against appellant, Fred Sippel, doing business under the name and style of the F. Sippel Auto Company, to recover a balance claimed to be due as wages under a written contract of employment. Upon the first trial there was a verdict for appellee, but a new trial was granted. The second trial resulted in a verdict in favor of appellee for $350.00, and this appeal followed.

On March 22, 1921, the parties entered into a written contract by the terms of which appellant employed appellee as manager of appellant's garage in Joliet, Illinois. Appellant was "to have charge of garage, work-shop, sales, stock, etc., under instructions furnished him by said F. Sippel." The employment was to be for one year, beginning April 1, 1921, and the salary was to be $250.00 per month, payable semi-monthly. Appellee worked from April 4, 1921, to October 1, 1921, and was paid in full. On the latter date a controversy arose over the adjustment on a tire. As a result of this controversy, appellee left the employment of appellant, and the first question for determination is whether he was improperly discharged by appellant, or whether he voluntarily quit the service. The evidence on behalf of appellant shows that at the end of the dispute over the tire adjustment, appellee became angry and said to appellant, "If that is the way you are going to carry on your business, I'm through", and appellant replied, "You don't have to go any further - you are through right now." Appellant

Arthur . Dun,

Appellee,

vs.

Fred Sippel, doing business under the name and style of . Sippel Auto Company,

Appellant,

Appeal from the Circuit Court of Ill County.

236 I.A. 648

Partlow, J.

Appellee, Arthur . Dun, began suit in the circuit court of Ill County against appellant, Fred Sippel, doing business under the name and style of the F. Sippel Auto Company, to recover a balance claimed to be due as wages under a written contract of employment. Upon the first trial there was a verdict for appellee, but a new trial was granted. The second trial resulted in a verdict in favor of appellee in [illegible] amount [illegible]

[illegible] appellant's garage in Joliet, Illinois. Appellant was to have charge of garage, work-shop, sales, stock, etc., under instructions furnished him by said F. Sippel." The employment was to be for one year, beginning April 1, 1921, and the salary was to be $250.00 per month, payable semi-monthly. Appellee worked from April 4, 1921, to October 1, 1921, and was paid in full. On the latter date a controversy arose over the adjustment on a tire. As a result of this controversy, appellee left the employment of appellant, and the first question for determination is whether he was improperly discharged by appellant, or whether he voluntarily quit the service. The evidence on behalf of appellant shows that at the end of the dispute over the tire adjustment, appellee became angry and said to appellant, "If that is the way you are going to carry on your business, I'm through", and appellant replied, "You don't have to go any further - you are through right now." Appellant

testified to this conversation, and he is corroborated by two witnesses who were in the garage at the time. The evidence on behalf of appellee shows that when this controversy arose appellant said to appellee, "You can take your God-damn slats and get out of here" Appellee did not quit at the time of this dispute which occurred about nine o'clock on Saturday morning, but continued to work during the remainder of that day. The next day, which was Sunday, was his day off. The following Monday he returned to the garage and when appellant saw him appellee testified he said, "I thought you were fired. When I tell a man he is fired, he is fired", and appellee replied, "If that is the case I suppose I am through." Appellant on direct examination testified that on Monday morning when he saw appellee, he told him - "that once he quit with me he didn't have to start again." On cross-examination when he was confronted with the transcript of the evidence of the prior trial, he admitted that he said, "Don't you consider yourself fired", and appellee said, "I didn't think you meant it that way." Appellant admitted that this testimony, given at the first trial, was correct, and that the testimony given at the second trial from which this appeal was prosecuted, was not correct. Appellant further admitted that on that Monday he said to appellee, "When I fire a man I figure he is fired." There is evidence of some prior trouble as to the manner in which appellee handled customers and employees of the garage. This is the principal evidence on which this verdict is based. We are asked to reverse this judgment on the ground that the finding of the jury that appellee was improperly discharged is contrary to the weight of the evidence. The question as to just what took place at the time of this controversy was a question of fact for the jury, and after reading the evidence we do not feel justified in saying that the verdict is contrary to the weight of the evidence.

It is next insisted that the verdict is excessive. Appellant contends that appellee, after ceasing to work for him, did not try to obtain employment in the same general line of work and at

testified to this conversation, and he is corroborated by two witnesses who were in the garage at the time. The evidence on behalf of appellee shows that when this controversy arose appel-

[illegible] of [illegible]. Appellee did not quit at the time of this dispute which occurred about nine o'clock on Saturday morning, but continued to work during the remainder of that day. The next day, which was Sunday, was his day off. The following Monday he re-

[illegible] appellee testified

[illegible] a man he is fired, he is fired", and appellee t[illegible] in the case I suppose I am through." Appellant on direct examination [illegible] that on Monday morning when he saw appellee, he told him - "that once he quit with me he didn't have to start again." On cross-examination he was confronted with the transcript of the evidence of the former trial, he admitted that he said, "Don't you consider your-[illegible] fired", and appellee said, "I didn't think you meant it that way." Appellant admitted that this testimony, given at the former trial, was correct, and that the testimony given at the [illegible] trial from which this appeal was prosecuted, was not correct. [illegible] ant further admitted that on that Monday he said to appellee, "[illegible] I fire a man I figure he is fired." There is evidence of some prior trouble as to the manner in which appellee handle[illegible] customers and employees of the garage. This is the principal evidence on which this verdict is based. We are asked to reverse [illegible] judgment on the ground that the finding of the jury that [illegible]lee was improperly discharged is contrary to the weight of the evidence. The question as to just what took place at the [illegible]

[illegible] the verdict is contrary to the we[illegible] the evidence.

It is next insisted that the verdict is excessive. Appellant [illegible] that appellee, after ceasing to work for him, did not

the same salary. The evidence shows appellee went to work a day or two after leaving the employment of appellant for the McClaren Tire and Rubber Company. He had been in the employ of the Racine Tire & Rubber Company before entering the employ of appellant, and two of the former employees of that company had formed the McClaren Tire & Rubber Company. Appellee testified that on the Sunday after this controversy with appellant, the two men who formed the McClaren Company were at his house and he told them what had taken place on the day prior, and they told him that if he got out of a job they would give him employment, and a day or two after leaving the employment of appellant, he entered their employ at a salary of $250.00 per month and continued during October, November and December. During January and February business was slack and he only received $200.00 per month. He left their employment the latter part of February and entered the employment of the Wayne Tank & Pump Company. According to the rules of this company he was required to take two weeks of instruction for which he did not receive any pay. The last two weeks of March he did not receive any salary from that company because he did not make any sales. Under this evidence he lost $50.00 per month for January and February, and was out of employment during the entire month of March, which made a total of $350.00, the exact amount of the verdict. Under the evidence we think it clearly appears that appellee was diligent in seeking other employment and was successful in getting almost the exact salary he was to receive under his contract with appellant. We see no reason for disturbing the judgment on the ground that it is excessive.

The court refused to permit appellant to prove what was the usual and customary method of making adjustment on tires and this ruling is urged as error. There is no question but what there was a dispute between appellant and appellee over a tire adjustment but that is not the question for determination in this case.

the same salary. The evidence shows appellee went to work a day or two after leaving the employment of appellant for the McClaren Tire and Rubber Company. He had been in the employ of the Racine Tire & Rubber Company before entering the employ of appellant, and two of the former employees of that company had formed the McClaren Tire & Rubber Company. Appellee testified that on his company after being contacted with appellant, the two men who formed the McClaren Company were at his house and he told them what had taken place on the day prior, and they told him that if he got out of a job they would give him employment, and a day or two after leaving the employment of appellant, he entered their employ at a salary of $250.00 per month and continued during October, November and December. During January and February business was slack and he only received $200.00 per month. He left their employment the latter part of February and entered the employment of the Wayne Tank & Pump Company. According to the rules of this company he was required to take two weeks of instruction for which he did not receive any pay. The last two weeks of March he did not receive any salary from that company because he did not make any sales. Under this evidence he lost .00 per month for January and February, and was out of employment during the entire month of March, which made a total of $350.00, the exact amount of the verdict. Under the evidence we think it clearly appears that appellee was diligent in seeking other employment and was successful in getting almost the exact salary he was to receive under his contract with appellant. We see no reason for disturbing the judgment on the ground that it is excessive.

The court refused to permit appellant to prove what was the usual and customary method of making adjustment on tires and this ruling is urged as error. There is no question but that there was a dispute between appellant and appellee over a tire adjustment but that is not the question for determination in this case.

The question at issue here is whether appellee voluntarily quit his employment, or whether he was improperly discharged in violation of his contract. What the quarrel was over and how it should have been settled, throws no light upon the question as to whether it did or did not result in the improper discharge of appellee. The court properly refused to admit the evidence as to the usual and customary method of making adjustments.

Appellant complains of the fourth and fifth instructions given on behalf of appellee, the modification of the sixth instruction offered by appellant, and the refusal of the court to give the fifteenth, sixteenth, seventeenth, eighteenth, nineteenth and twentieth instructions offered by appellant. We do not think it is necessary to pass specifically upon each of these instructions and to consider each error assigned. We have read all of the instructions and are of the opinion that the jury was fully instructed as to the law applicable to the facts in this case, and that there was no reversible error in any instruction given, refused or modified.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of March in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson
*Clerk of the Appellate Court.*

34 (Oct)

43 Hon

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:



Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State
of Illinois,

Defendant in error,

vs.

Carl Ault,

Plaintiff in error,

236 I.A. 648

Error to the County Court of
Kankakee County.

Partlow, J.

Plaintiff in error, Carl Ault, was found guilty in the county court of Kankakee county, upon an information charging him with impersonating an officer and a writ of error has been prosecuted from this court to review the judgment.

The first error urged is that the information and each count thereof is not sufficient upon which to base the judgment. The information does not appear in the abstract, briefs or arguments, and for that reason, under the rules of this court, the question of the sufficiency of the information is not properly before us for consideration.

The only remaining question is whether the judgment is supported by the law and the evidence. The evidence shows that on April 23, 1924, about eleven o'clock P.M., George Ward, Hilton Ward, Ray Mark, and three ladies were riding east on Court street, in the City of Kankakee. Near the east city limits their automobile passed another automobile going west containing the plaintiff in error, Dallas Elliott, and a man by the name of McCarthy. The parties in the Ward car testified they were driving between thirty and thirty-five miles per hour. The parties in the car of plaintiff in error testified the Ward car was going between fifty-five and sixty miles per hour. After the cars passed each other plaintiff in error turned his car around and started in pursuit of the Ward car. The evidence shows that he overtook the Ward car about two and one-half miles east of the city limits. The evidence on behalf of the defendant in error is that plaintiff

The People of the State
of Illinois,
Defendant in error,
vs.
Earl Ault,
Plaintiff in error,

Error to the County Court of
Kankakee County.

1.

Plaintiff in error, Earl Ault, was found guilty in the county court of Kankakee county, upon an information charging him with impersonating an officer and a writ of error has been prosecuted from this court to review the judgment.

The first error urged is that the information and each count thereof is not sufficient upon which to base the judgment. The information does not appear in the abstract, briefs or arguments, and for that reason, under the rules of this court, the question of the sufficiency of the information is not properly before us for consideration.

The only evidence material to the question is supported by the law and the evidence. The evidence shows that on April 17, 1917, Henry Ahrens, Walter Ahrens, Walter Hoffman, Guy Cook, Henry Ahrens and Walter Ahrens were driving in the City of Kankakee. Near the east city limits their automobile passed another automobile going west containing the plaintiff in error, Dallas Hilliott, and a man by the name of Hogarthy. The parties in the Ward car testified they were driving between thirty and thirty-five miles per hour. The parties in the car of plaintiff in error testified that they were driving between three and eighty miles per hour. After the cars passed each other plaintiff in error turned his car around and started in pursuit of the Ward car. The evidence shows that he overtook the Ward car about two and one-half miles east of the city limits. No

in error got out on the running board of his car, had a gun in his hand, displayed a star, and commanded the occupants of the Ward car to stop. The Ward car went into the ditch and the car of plaintiff in error passed it. Both cars turned around and started back toward the city. There is evidence that shots were fired by both plaintiff in error and Elliott and one of which struck a tire on the Ward car. Both cars drove back to the city and the Ward car stopped at the curb. Plaintiff in error got out of his car, went over to the Ward car and asked the occupants why they did not stop; said they should have known he was an officer, and informed them they would have to go to the police station on a charge of speeding. The parties in the Ward car said they were going to the police station, and plaintiff in error got on the running board of their car and rode with them to the police station. The contention of the occupants of the Ward car is that they supposed the men in the Ault car were hold-up men, and they tried to escape from them, that they at no time violated the law. Upon the charge of speeding they were found not guilty.

There is no doubt but what plaintiff in error attempted to arrest the occupants of the Ward car on a charge of speeding, and he represented himself to be an officer. He denies he claimed to be an officer. His contention is that he was an inspector of the department of constabulary, was in charge of eight counties, that Elliott was a sergeant under him, and both of them had the right to carry guns. Their stars as members of the department of constabulary were offered in evidence, and they testified that one of them was an inspector and the other was a sergeant. The question is whether this was a defense to the charge of impersonating an officer. Section 489, chapter 32, Cahill's Statutes of 1923, page 972, provides for the organization of companies for the detection and apprehension of horse thieves and other felons. The statute provides the method in which these companies may be

an error got out on the running board of his car, had a gun in hand, displayed a star, and commanded the occupants of the Ward car to stop. The Ward car went into the ditch and the car of plaintiff in error passed it. Both cars turned around and started back toward the city. There is evidence that shots were fired by both plaintiff in error and Elliott and one of them struck a tire on the Ward car. Both cars drove back to the city and the Ward car stopped at the curb. Plaintiff in error got out of his car, went over to the Ward car and asked the occupants why they did not stop; said they should have known he was an officer, and informed them they would have to go to the police station on a charge of speeding. The parties in the Ward car said they were going to the police station, and plaintiff in error got on the running board of their car and rode with them to the police station. The contention of the occupants of the Ward car is that they thought he was a bandit and just did not stop in time. They did not intend to violate the law. Upon the charge of speeding they were found not guilty.

There is no dispute that plaintiff in error, commanding a person by exhibiting a star and by a verbal command, stopped a vehicle on a public highway, was a peace officer. He was a deputy in the department of constabulary, was in charge of eight counties, and Elliott was a sergeant under him, and both of them had the right to carry guns. Their status as members of the department of constabulary was not in question.

The question is whether this was a defense to the charge of impersonating an officer. Section 489, chapter 38, Smith's Statutes of 1923, page 372, provides for the organization of companies for the detection and apprehension of horse thieves and other felons. The statute provides the method in which these companies may

organized; that the articles of incorporation shall be filed with the county recorder of deeds; that when so organized they shall be a body corporate with power to sue and be sued, and to adopt a constitution and by-laws. Section 5 provides they may select certain members who are to be recommended for appointments as deputy sheriffs, and makes provision for the filling of vacancies. There is nothing in the statute which authorizes all the members of such an organization to be officers or which gives them the right to make arrests. The mere statement of plaintiff in error that he was an inspector of the department of constabulary does not justify his actions under the evidence in this case. If he was appointed a deputy sheriff, as provided in the statute, then his commission as such deputy sheriff would have been a defense in this case. The only thing he had was a star, without any commission, and for that reason he was not an officer. Not being an officer he was guilty of impersonating an officer.

It is sought in a measure to justify the action of plaintiff in error upon the ground that he was a citizen and the law was violated in his presence and he had a right to arrest the parties in the card car. The only trouble with this contention is that it is not sustained by the evidence. Plaintiff in error did not attempt to arrest the occupants of the card car on the theory that he was a citizen and had a right to arrest people who violated the law in his presence, but he attempted to arrest them as an officer of the law. He had a star and a gun and his authority is sought to be justified on the ground that he was an officer.

We think the evidence was sufficient to sustain the judgment and it will be affirmed.

Judgment affirmed.

[illegible] that the articles of incorporation shall be filed with [illegible] a [illegible] institution and [illegible]. Section 5 provides they may select [illegible] members who are to be recommended for appointments as [illegible] sheriffs, and makes provision for the filling of vacancies. [illegible] is nothing in the statute which authorizes all the members of [illegible] an organization to be officers or which gives them the [illegible]. [illegible] plaintiff in error [illegible] was an inspector of the department of constabulary does not justify his actions under the evidence in this case. If he [illegible] appointed a deputy sheriff, as provided in the statute, then [illegible] as and deputy sheriff would have been a defense [illegible]. The only thing he had was a star, without any commission, and for that reason he was not an officer. Not being [illegible].

[illegible] is error upon the ground that [illegible] and [illegible] in the hand car. The only trouble with this contention is that it is not sustained by the evidence. Plaintiff in error did not [illegible] to arrest the [illegible] [illegible] arrest or the law. He had a star and a gun and his authority is [illegible].

We think the evidence was sufficient to sustain the judgment and it will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of March in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson
Clerk of the Appellate Court.

-Hearing denied April 7, 1925

7402

42264

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:



Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Chicago, Milwaukee & Gary Railway Company,

Appellee.

vs

Rockford City Traction Company,

Appellant.

Appeal from the Circuit Court of Winnebago County.

236 I.A. 648

Partlow, J.

Appellee, the Chicago, Milwaukee & Gary Railway Company, began an action of assumpsit in the circuit court of Winnebago county against appellant, Rockford City Traction Company, to recover certain sums of money alleged to have been paid by appellee as damages resulting from a collision between a street car of appellant and a freight train of appellee, which damages appellee claims appellant was liable to pay. There was a trial by jury, a verdict in favor of appellee for $3225.03, and this appeal was prosecuted.

On August 27, 1907, the Illinois, Iowa & Minnesota Railway Company, designated herein as the railway company, being the predecessor of appellee, the Chicago, Milwaukee & Gary Railway Company, and the Rockford and Interurban Railway Company, designated herein as the electric company, being the predecessor of appellant, Rockford City Traction Company, entered into a written contract substantially as follows:

The Electric Company has the right to construct, maintain and operate at its own expense, a single track railway across the track of the Railway Company at the intersection of the tracks of the two corporations on the east side of Eleventh street in the Township of Rockford, County of Winnebago and State of Illinois:

The grant is expressly conditioned upon the performance by the Electric Company of all the covenants, as follows:

1. The Electric Company agrees that the Railway Company shall, have the right to retain and operate as heretofore the track now owned and operated by it at said crossing, and shall also have the right, at all times, to lay, maintain and operate over the track of the Electric Company, such additional tracks as the Railway Company may, from time to time, deem necessary, and the Electric Company will never in any manner impair the usefulness of any of the tracks of the

Railway Company.

2. The Electric Company covenants that it will at its own expense provide all material for and construct the crossing in such manner as shall be satisfactory to the Railway Company.

3. The Electric Company covenants that it will at its own expense forever maintain, repair and renew all of its crossings with the existing track of the Railway Company and in such manner as shall be satisfactory to the Railway Company.

4. The Railway Company shall have the right at all times to change the grade of its road bed and tracks as it may deem proper, and the Electric Company at its own expense, upon reasonable notice, shall make such changes in the grade of its railroad and track as may be necessary to conform to the change in the grade of the road bed and tracks of the Railway Company.

5. The Electric Company covenants that it will at its own expense furnish and put in place and forever repair such a system of crossing signals, gates, targets, or other appliances for protecting said crossing as shall from time to time be mutually satisfactory.

All expense of operating and attending such signals shall be paid by said Electric Company, and all gateman or flagmen shall, as to any question of responsibility for his acts or omissions, be deemed to be the exclusive employe of said Electric Company - provided, all expense of installing, maintaining and operating gates, flagmen and signals required by the public authorities for the prupose of protecting the public highway crossing against the Illinois Company, shall be borne by said company.

6. In the operation of its railroad each party hereto except as hereinafter provided, assumes all risk of damage to its own trains, locomotives and cars and other property, and all liability for all deaths, personal injuries and damages to property, ~~and all liability for all~~ occurring on its trains, locomotives and cars (including deaths, and personal injuries to employes, as well as others) arising out of the negligence, wrongful acts or omissions of any of its own officers, agents, servants or employes.

7. The Electric Company shall construct and maintain its wires beneath the wires of the Railway Company, so as to clear the lowest wire of the Railway Company by at least five feet; and the wires of the Electric Company shall be placed twenty-two feet above the top of the rail of the tracks of the Railway Company.

The Electric Company shall at its won expense construct guard wires in such a manner as shall be approved by the Railway Company, in order to protect the wires of the Railway Company from all possible danger of contact with the wires of the Railway Company; and the Electric Company will at all times reimburse the Railway Company for all loss or damage which it may sustain, and will save harmless the Railway Company from all claims of every kind, which may be made against said Railway Company on account of the construction, maintenance or use of said wires.

8. The Electric Company agrees that it will at all times stop its cars before crossing the tracks of the Railway Company, and will require the conductor of each of said cars, before attempting to cross the tracks of the Railway Company, to ascertain positively that said tracks can be safely crossed; it being expressly understood that neither the Electric Company nor itsemployes shall, in operating cars or trains of cars over said crossing, have the right to take, accept or rely upon signals of any employe of the Railway Company.

It is agreed that the failure to stop cars of the Electric Company, or the failure of conductors of said Electric Company to ascertain positively that said Crossing can be safely passed over by said cars of the Electric Company, shall, as between the parties, be deemed to conclusively establish negligence on the part of the Electric Company; but the operation of its engines or trains by the Railway Company at a higher rate of speed than is allowed by any municipal ordinances, or statutes shall not be deemed to be negligence on its part, should any of the cars of the Electric Company be struck by the en-

railway Company.

The Electric Company covenants that it will at its own expense vide all material for and construct the crossing in such manner as l be satisfactory to the Railway Company.

The Electric Company covenants that it will at its own expense ever maintain, repair and renew all of its cross sing with the exist- g track of the Railway Company and in such manner as shall be satis- to the Railway Company.

The Railway Company shall have the right at all times to the grade of its road bed and tracks as it may deem proper, lectric Company at its own expense, upon reasonable notice, such changes in the grade of its railroad and track as may ary to conform to the change in the grade of the road bed of the Railway Company.

The Electric Company covenants that it will at its own expense and put in place and forever repair such a system of crossing ls, gates, targets, or other appliances for protecting crossing as shall from time to time be mutually satisfactory. All expense of operating and attending such signals shall by said Electric Company, and all flagmen l reation of responsibility for his acts or omissions, be deemed exclusive employe of said Electric Company - provided, ll of installing, maintaining and operating gates, flagmen and ered by the public authorities for the purpose of pro- the public Railway crossing against the Illinois Commerce be borne by said company.

In the operation of the cross ngs as above con- matter provided, assumes all risk of damage and care and other property, and all personal injuries and damages to pe occurring on its trains, locomotives and cars (including death, onal injuries to employes, as well as citizens) arising of ence, wrongful acts or omissions of any of its servants or employes.

The Electric Company shall construct and maintain its fence the wires of the Railway Company, so as to place the lowest of the Railway Company by at least five feet; and the wires of tric Company shall be placed twenty-two feet above the top rail of the tracks of the Railway Company.

The Electric Company shall at its own expense construct wires in such a manner as shall be approved by the Railway Com- in order to protect the wires of the Railway Company from al ible danger of contact with the wires of the Railway Company; and tric Company will at all times reimburse the Railway Company ll loss or damage which it may sustain, and will save harmless lway Company from all claims of every kind, which may be made inst said Railway Company on account of the construction, ce or use of said wires.

The Electric Company agrees before crossing the tracks of the Railway the conductor of said car, before cross the tracks of the Railway Company, to ascertain tracks can be safely crossed; if being so, said er the Electric Company nor its employes shall, in or trains of cars over said crossing, have the right or rely upon signals of any employe of the Railway.

It is agreed that the failure to stop cars or com- any, or the failure of conductors of said Electric Company to do so, n posively that said crossing can be safely passed over by said of the Electric Company, shall, as between the parties, be deemed ondatively establish negligence on the part of the Electric - but the operation of its engines or trains by the said Railway Com- t a higher rate of speed than is allowed by any municipal ordi- or statutes shall not be deemed to be negligence on its part, any of the cars of the Electric Company be struck by the en-

gines or trains of the Railway Company.

The Electric Company agrees to reimburse the Railway Company for all loss or damage which they may sustain; and will protect, indemnify and save harmless the Railway Company from any and all claims of every kind, nature and description which may be made against said Railway Company on account of or growing out of any such collision, resulting from failure of the Electric Company to comply with any requirements of this contract.

9. The engines, cars and trains of the Railway Company shall always have precedence at said crossing over the cars of the Electric Company.

The crossing was built as provided in the contract, and was in operation to the date of the accident out of which this suit arose. About 7:45 on the night of September 27, 1915, a freight train, consisting of an engine, twenty-nine cars and caboose was headed west in the yards of appellee, west of Eleventh street, in the city of Rockford. The caboose was from eight to nine cars west of the crossing. On the rear end of the caboose were the ordinary lights. The train was to back east over Eleventh street to get water from a water spout which was about a rod from the east sidewalk of Eleventh street. Just before they started to back there was a signal to back from the top of the caboose. The head brakeman was on the car next to the engine, and the engineer got the signal from him. The head brakeman was supposed to get his signal from the rear brakeman. The engineer answered the signal by two blasts of the whistle and then started to back up. He testified that he whistled for the crossing, two long and two short blasts, and just after he got started and before he reached the crossing, he whistled the second time, two long and two short. The bell was being automatically rung by air. The headlight was lit but was facing west. After the engine started to back the engineer received a signal to stop from both the rear and head brakemant. The train was going four or five miles an hour and had gone six or seven car lengths. A street car belonging to appellant was going north on Eleventh street and stopped just south of the sourt track of appellee and the conductor ran forward to the crossing and signalled the car to go ahead. The freight train struck the street car as it was on the crossing. The engineer saw the caboose hit the street car and saw the lights go out on the street car which was partly over the main track.. The rear brakeman testified he made a signal with

nes or trains of the Railway Company.

The Electric Company agrees to reimburse the Railway Company all loss or damage which they may sustain, and will protect, indemnify and save harmless the Railway Company from any and all of every kind, nature and description which may be made against Railway Company on account of or growing out of any such collision, ing from failure of the Electric Company to comply with any re- ments of this contract.

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his lantern and he whistled, and just as the impact came he shouted. The caboose and the next car to it had passed to the east of the street car track, knocking the rear end of the street car to the east and off the track. Edwin Johnson, a passenger on the street car, was killed, and several persons were injured, including Carl Ekeberg. The conductor of the street car testified he did not know the train was there; that he heard no noise and saw nothing in motion until he saw the rear end of the caboose close to the street car. He signaled the motorman to go ahead as fast as possible but the rear end of the street car did not clear the railroad tracks.

Two suits were begun against appellant and appellee.. One on behalf of Ekeberg, and the other by the estate of Johnson. Before the trial, on December 7, 1916, a stipulation was entered into which provided

"1. That a judgment be entered against both defendants in favor of the estate of Edwin Johnson for $5,500 and costs.

2. That for the purpose of settling the judgment, each of the defendants advance one-half of the judgment.

3. That in so doing, neither of the defendants admit liability as between themselves but that liability shall be determined upon the evidence and the said crossing agreement hereinafter referred to.

4. That between the defendants, the liability shall be determined by arbitration if the parties so agree or by suit in the Circuit Court of Winnebago County, either party having the right to sue the other in assumpsit, all technical objections to the nature of the suit being waived.

5. Upon it being determined which of the defendants as between themselves, is liable for the said death, 'the defendant not liable shall be reimbursed the amount advanced aforesaid by the defendant found liable, 'which agreement was made on the 7th day of December, 1916, and signed by the parties by their attorneys respectively; that pursuant to the said agreement, judgment was entered in the sum of $5,500 and costs and that thereafter on the 4th day of January, 1917, the plaintiff paid the sum of $2,772.08 in satisfaction of one-half of said judgment; that the liability between the parties hereto has not been determined by arbitration or agreement or by suit in the Circuit Court of Winnebago County; that by reason of the facts aforesaid, a cause of action has accrued to plaintiff in the sum of $2,772.08 and interest at 5% per annum from date of payment."

Appellant paid to Ekeberg a certain sum of money because of said injury, and received from him a covenant not to sue, and thereafter the suit which had been brought by Ekeberg against both defendants proceeded to trial against the appellee as the sole defendant. The jury returned a verdict against appellee for $400.00, and on July 18,

[illegible] the tr ck. Edwin Johnson, a passenger on the street car, was killed, and several persons were injured, including Carl Meberg, the conductor of the street car testified he did not know the train was there; that he heard no noise and saw nothing in motion until [illegible] the rear end of the [illegible] close to the street car. He [illegible] of the street car did not clear the railroad tracks.

Two suits were begun against appellant and appellee. One on behalf of Meberg, and the other by the estate of Johnson. Before the trial, on December 7, 1916, a stipulation was entered into which [illegible]

"1. That a judgment be entered against both defendants in favor of the estate of Edwin Johnson for $8,500 and costs.

2. That for the purpose of settling the judgment, each of the defendants advance one-half of the [illegible]

3. That in so doing, neither of the defendants admit liability between themselves but that liability shall be determined upon the [illegible] and the said crossing agreement hereinafter referred to.

4. That between the defendants, the liability shall be determined by arbitration if the parties so agree or by suit in the Circuit Court of Winnebago County, either party having the right to use [illegible] in assumpsit, all technical objections to the nature of the [illegible] being waived.

5. Upon it being determined which of the defendants as between themselves, is liable for the said death, the defendant not liable shall be reimbursed the amount advanced after said by the defendant [illegible] liable, which agreement was made on the 7th day of December, [illegible] signed by the parties by their attorneys respectively [illegible] to the said agreement, judgment was entered in the [illegible] and costs and that thereafter on the 4th day of [illegible] plaintiff paid the sum of $8,772.08 in satisfaction [illegible] judgment; that the liability between the parties [illegible] been determined by arbitration or agreement or by [illegible] Court of Winnebago County; that by reason of the [illegible] a cause of action has accrued to plaintiff in the [illegible] and interest at 5% per annum from date of p[illegible]

Appellant paid to Meberg a certain sum of money because of said injury, and received from him a covenant not to sue, and thereafter the suit which had been brought by Meberg against both defendants proceeded to trial against the appellee as the sole defendant. The [illegible] returned a verdict against appellee for $400.00, and on July 18,

1917, appellee paid $452.95.

Appellee made a demand upon appellant for the amount paid to the Johnson estate, and the amount paid to Ekeberg. Appellant refused to pay and appellee began this suit claiming that appellant under the contract of August 21, 1907, was liable for both of these amounts, and a judgment was rendered against appellant as above stated for the full amount of both claims paid by appellee.

Appellant contends as ground for reversal, that the contract of August 21, 1907, is void because there is no consideration sufficient to support it, and that it is also void because it is contrary to public policy.

As we understand the contention of appellant it is not claimed that the contract is without consideration but that the consideration is not sufficient to support the contract. In support of this contention appellant claims appellee had but an easement in the crossing in question which it claims was within the city of Rockford, and appellee's right was subject to the right of the public to use the street; that the crossing of the tracks of the railway company gave no right to compensation, it being merely an increased inconvenience to which appellee must submit; that the only right of appellant under the contract was to lay its tracks across the tracks of the railroad, and in consideration thereof, appellant agreed to do many things which neither company had the right to control for the reason that these matters were entirely within the control of the Illinois Railroad & Warehouse Company; that appellee, in constructing its track across the highway, acquired merely the privilege of crossing subject to all proper uses to which the highway might be devoted under the law; that appellee was bound to know that a street car track might thereafter be lawfully located upon such highway and across the track at that point, and the Railroad & Warehouse Commission, in whom the authority was vested, had the right to determine as to the location and construction of the crossing; that when appellee built its railroad it did so with the knowledge and upon the condition that it must submit to such

growing inconvenience as might result from the development of the country or the city including the demand of the public for better facilities for traveling; that under these circumstances there was no encroachment upon the legal rights of the Railroad Company, and none of its property was taken or damaged in contemplation of law, and that it was not entitled to recover compensation for the crossing of its tracks by appellant; that if the crossing was within the city limits of the city of Rockford, then appellee would have nothing to sell or give away. The city streets were owned by the city, and under such circumstances there was no taking of property by appellee by reason of the hindrance and burden imposed by the crossing of its tracks, and for that reason there was not sufficient consideration to sustain this contract.

Our attention is not called to any place in the record where it appears that this crossing is within the corporate limits of the city of Rockford. The contract states that it is in the township of Rockford, Winnebago county, Illinois. If the crossing was not within the corporate limits of the city at the time the contract was entered into then the city at that time had nothing to do with it. If the corporate limits were changed after the contract was executed and the crossing was included within the corporate limits that fact would not invalidate the contract. If the crossing was not within the corporate limits at the time the contract was executed, then the Railroad & Warehouse Commission under the statute had jurisdiction over the crossing. But that fact did not preclude the predecessors of appellant and appellee from entering into a contract with reference to the construction and maintenance of the crossing and the rights and obligations of the parties thereto, provided the contract was not in contravention of law.

It is not essential that the consideration should import a certain gain or loss to either party. It is sufficient if the party in whose favor the contract is made foregoes some advantage or benefit, or parts with a right which it might otherwise exert. 6 R.C.L. 558.

[illegible] on the city including the land of the city for better facilities for travelling; that under these circumstances there was [illegible] upon the legal rights of the Railroad Company, and [illegible] the property was taken or damaged in contemplation of law. It was not entitled to recover compensation for the crossing [illegible] tracks by appellant; that if the crossing was within the limits of the city of Rockford, then appellee would have [illegible] to sell or give away. The city streets were owned by the city, [illegible] under such circumstances there was no taking of property [illegible] by reason of the hindrance and burden imposed by the [illegible] of its tracks, and for that reason there was not [illegible] tion to sustain this contract.

[illegible] tention is not called to any place in the record where [illegible] that this crossing is within the corporate limits of the [illegible] Rockford. The contract states that it is in the township [illegible] Winnebago county, Illinois. If the crossing was not [illegible] corporate limits of the city at the time the contract was [illegible] into then the city at that time had nothing to do with it. [illegible] corporate limits were changed after the contract was executed [illegible] ing was included within the corporate limits that fact [illegible] invalidate the contract. If the crossing was not within [illegible] corporate limits at the time the contract was executed, then the [illegible] & Warehouse Commission under the statute had jurisdiction [illegible] road. But that fact did not preclude the predecessors [illegible] appellant and appellee from entering into a contract with reference [illegible] construction and maintenance of the crossing and the rights [illegible] obligat one of the parties thereto, created the contract was not [illegible]

It is not essential that the consideration should inure a [illegible] gain or loss to either party. It is sufficient if the party [illegible] whose favor the contract is made forgoes some advantage or benefit, [illegible] parts with a right which it might otherwise exert. 6 R.C.L. 688.

In Ruling Case Law, 678, it is stated: "That the adequacy of the consideration is immaterial, has been undoubted law ever since the notion of consideration began to be developed. The reason is that the parties are deemed to be the best judges of the bargains entered into." The contract was under seal, therefore a consideration is implied. Even if it was not under seal there would be a sufficient consideration if the party in whose favor the contract was made foregoes some advantage or benefit, or parts with a right which it might otherwise exert. It is a well known fact that crossing cases sometimes involve many difficulties, delays, and much expense, even where the law entitles the parties to make the crossing. By this contract all of these difficulties, delays and expenses were avoided. It was agreed that no resistance should be made and that the crossing should be put in. This was an advantage and benefit to appellant. The predecessor of appellee estopped itself from offering physical, legal or technical objections to the establishment of the crossing and it thus parted with a right which it might otherwise have exercised. In return for this concession appellant made certain agreements with reference to putting in the crossing at its own expense. It agreed to maintain the same and to establish signals or watchmen, and to do various other things as recited in the contract. There was a consideration for the contract and that consideration was sufficient to make the contract legal and binding.

In support of the contention that the contract is void because it is in contravention of public policy, appellant calls attention to the tighth paragraph of the contract which requires the cars of appellant to stop upon reaching the crossing, and requires the conductor to go forward to the crossing and see that no trains of appellee are approaching. Attention is especially called to that part of the paragraph which provides that neither the Electric Company nor its employes, shall in operating cars or trains of cars over said crossing have the right to take, accept, or rely upon signals of any employe of the Railroad Company. Also that part which provides that the failure to stop said cars, or the failure of the conductor to

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In support of the contention that the contract is void because it is in contravention of public policy, appellant [illegible] attention to the tight paragraph of the contract which requires the case of appellant to stop upon reaching the crossing, and conductor to go forward to the crossing and see that appellee are approaching. Attention is especially called [illegible] part of the paragraph which provides that neither [illegible] nor its employes, shall in operating cars or trains [illegible] crossing have the right to take, accept, or rely upon signals of any employe of the Railroad Company. Also that part which provides that the failure to stop said cars, or the failure of the conductor to

ascertain positively that the crossing can be safely made, shall, as between the parties, be deemed to conclusively establish negligence on the part of the Electric Company, but the operation of its engines, or trains by the railway company at a higher rate of speed than is allowed by any municipal ordinance or statute, shall not be deemed or held to be negligence on its part should any of the cars of the Electric Company be struck by the engines or trains of the Railway Company. It is insisted that appellee cannot limit its liability as provided in the contract; that these provisions are contrary to public policy, and for that reason the contract is void.

Appellant is not in a very good position to raise this question. After the accident there was a conference between appellant and appellee. Both parties knew the provisions of the contract. With full knowledge of all the facts, the stipulation of December 7, 1916, was entered into. Under this stipulation appellee paid $2772.08 on the Johnson judgment, and $452.95 on the Ekeberg judgment. To now permit appellant to say that the contract was void on the ground that it was contrary to public policy would be to permit appellant to take advantage of its own wrong. If appellant considered the contract void, it should not have entered into the stipulation of December 7, 1916, and thereby permitted appellee to pay out its money.

But aside from this view of the case, we do not think the contract is contrary to public policy. The only part of the eighth paragraph to which there would be any objection is that part which provides that the operation of the trains or engines of appellee at a higher speed than allowed by law shall not be deemed to be negligence on the part of appellee should any of the property of appellant be injured. There is no attempt in any part of this contract to bind the public in any way, or to bind anybody except the parties to the contract and their successors and assigns. Section six among other things, provides that in the operation of its railroad, each party, except as otherwise provided in the contract, assumes all the risk of damage to its trains and other property, and all liability for all personal injury, death and damage to property occurring on its trains, including ~~death or personal injury to employees as well as others, arising~~

ascertain positively that the crossing can be safely made, shall, in fairness the parties, be deemed to conclusively establish negligence on the part of the Electric Company, but the operation of its engines, in taking by the railway company at a higher rate of speed than is allowed by any municipal ordinance or statute, shall not be deemed or held to be negligence on its part should any of the cars of the Electric [illegible]

[illegible] contract; that these provis[illegible] [illegible] for that reason the contract is void.

Appellant is not in a very good position to raise this question. [illegible] accident there was a conference between appellant and [illegible]. Both parties knew the provisions of the contract. With full [illegible] of all the facts, the stipulation of December 7, 1916, was [illegible] into. Under this stipulation appellee paid $2272.08 on the [illegible] judgment, and $424.92 on the Kneberg judgment. To now [illegible] appellant to say that the contract was void on the ground that it was contrary to public policy would be to permit appellant to [illegible] advantage of its own wrong. If appellant considered the contract void, it should not have entered into the stipulation of December 7, 1916, and thereby permitted appellee to pay out its money.

Put aside from this view of the case, we do not think the contract is contrary to public policy. The only part of the eighth [illegible] to which there would be any objection is that part which [illegible] that the operation of the trains or engines of appellee at [illegible] see than allowed by law shall not be deemed to be negligence [illegible] part. If appellee should any of the property of appellant be [illegible]. There is no attempt in any part of this contract to bind the [illegible] in any way, or to bind anybody except the parties to the contract [illegible] successors and assigns. Section six among other things, [illegible] that in the operation of the railroad, each party, except as [illegible] provided in the contract, assumes all the risk of damage to [illegible] and other property, and all liability for all personal [illegible] to persons, including [illegible]

deaths and p rsonal injuries to employes as well as others, arising out of the negligence, wrongful act, or omission of any of its own officers, agents, servants, or employes. The rights of the parties are only changed in so far as other provisions of the contract limit the liability of the respective parties. Every day, policies of insurance are entered into in which insurance companies insure property owners against loss by fire caused by the owner's own negligence, and no question is raised that these contracts are contrary to public policy. In Illinois Central Railroad Company vs. Read, 37 Ill., 485, it was held that railroad companies have a right to restrict their liability as common carriers by such contracts as may be agreed upon specially, the companies still remaining liable for gross negligence or willful misfeasance against which good morals and public policy forbid they should be permitted to stipulate. In Toledo, Wabash & Western Railroad Co. vs. Beggs, 85 Ill., 80 it was held that if a passenger on a railway train while riding under a free ticket containing the usual restrictions, is injured by an accident, he cannot hold the company liable except for gross negligence, or a degree of negligence having the character of recklessness. In Chicago & Northwestern Railway Company vs. Chapman, 133 Ill., 96, it was held that railroad companies have the right to restrict their liability as common carriers by such contracts as may be agreed upon specially, provided they still remain liable for gross negligence or wilful misfeasance against which good morals and public policy forbid they should be permitted to stipulate. In Blank vs. Illinois Central Railroad Company, 182 Ill., 332, there was a contract between a railroad company and an express company which provided that the former should not be liable for negligence respecting injury to express company employe as a condition to granting the right to carry express on its trains. Employes of the express company brought suit against the railway company for injuries sustained, the latter offered in evidence the contract, which was admitted, and it was contended that the contract was void as against public policy, but the court held otherwise. In Griffiths & Son Co. vs. Fire Proofing Co. 310 Ill., 331, there was a

[illegible] and personal injuries to employees as well as others, arising out of the negligence, wrongful act, or omission of any of its own officers, agents, servants, or employees. The rights of the parties are only changed in so far as other provisions of the contract limit the liability of the respective parties. Every day, policies of insurance are entered into in which insurance companies insure property owners against loss by fire caused by the owner's own negligence, and no question is raised that these contracts are contrary to public policy. In Illinois Central Railroad Company v. Read, 87 Ill., 486, it was held that railroad companies have a right to restrict their liability as common carriers by such contracts as may be agreed upon specially, the companies still remaining liable for gross negligence or willful misfeasance against which good morals and public policy forbid they should be permitted to stipulate. In [illegible] Wabash & Western Railroad Co. vs. Beggs, 85 Ill., 80 it was held that if a passenger on a railway train while riding under a free ticket [illegible] assent, he cannot hold the company liable except for gross negligence, or a degree of negligence having the character of recklessness. In [illegible] Chicago & Northwestern Railway Company vs. Chapman, 155 Ill., 96, [illegible] held that railroad companies have the right to restrict their liability as common carriers by such contracts as may be agreed upon specially, provided they still remain liable for gross negligence or willful misfeasance against which good morals and public policy forbid they should be permitted to stipulate. In Black vs. Illinois Central Railroad Company, 182 Ill., 322, there was a contract between a railroad company and an express company which provided that the former should not be liable for negligence respecting injury to express company employe as a condition to granting the right to carry express on its trains. Employes of the express company brought suit against the railway company for injuries sustained, the latter offered in evidence the contract, which was admitted, and it was contended that the contract was void as against public policy, but the court held otherwise. In Wright vs. The & Son Co. vs. Pine Forestry Co. 310 Ill., 321, there was a

contract which limited the liability of the owner of the building and other parties. There was a suit for damages and in determining the validity of this contract the court said: "The validity of a contract of indemnity cannot be questioned and is not affected by the fact that the indemnitor is the contractor or sub-contractor rather than an insurance company. (Herman Construction C. vs. City of St. Louis, 256 Mo., 332). The question of the extent to which public policy would restrict the right of an insurance company to issue a policy insuring against liability by reason of the operation of an automobile was considered in the case of Messersmith vs. American Fidelity Company, 232 N. Y., 161, in which it was said that the legislature had authorized insurance companies to indemnify against liability for loss and damage throughtthe use and maintenance of automobiles. The court said "to restrict insurance to cases where liability is incurred without fault of the insured would reduce indemnity to a shadow." And the court held that there seemed to be no basis for holding that it was contrary to public policy for contractors to indemnify owners of buildings and subcontractors against loss occasioned by the actual negligence of the indemnitor even though such owners or original contractors were guilty of positive or constructive negligence. Other cases might be cited from other jurisdictions in which a similar rule has been announced. The terms of this contract do not excuse either of the parties from gross or wilful negligence. The provisions relate only to the parties and do not attempt to li it the liability of either to the general public. From a consideration of all the terms of this contract we are of the opinion that it was not void on account of being in contravention of public policy.

For the reasons indicated the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson
*Clerk of the Appellate Court.*

(Oct)

4237

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

236 I.A. 649

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On 31 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The Webster Company, a corporation,
appellee,
vs.
Lemon Manufacturing Company, a corporation,
appellees,
Harry C. Knisely,
appellant,

Appeal from the Circuit Court of Du Page County.

236 I. A. 649

Partlow, J.

Appellee, The Webster Company, a corporation, filed its bill in the circuit court of Du Page county for the appointment of a receiver for the Lemon Manufacturing Company, a corporation. Receivers were appointed, and appellant, Harry C. Knisely, who was the landlord of the Lemon Manufacturing Company, filed his claim for $497.60 rent alleged to be due under a distress warrant previously levied against certain property of the corporation by appellant. The court allowed the amount alleged to be due as a general claim, but refused to allow it under the distress warrant as a lien upon the property, and this appeal was prosecuted.

The evidence shows that appellant was the owner of a four story building in Chicago, occupied by about twenty tenants. On March 25, 1922, he leased certain space on the second floor to the Lemon Manufacturing Company at a rental of $200.00 per month. The rent was paid to August 1, but was not paid for August, September and October. On October 14th, a distress warrant was issued for $697.60 and levied on four large punch presses and one milling machine. A copy of the warrant was served on an officer of the corporation, and a copy was attached to each of the machines levied upon, which copies remained on the machines until they were taken from the building by the receivers. The machines were heavy, weighing in excess of one ton each, and were not capable of being moved without considerable expense.

The Webster Company, a corporation,

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The evidence shows that appellant was the owner of a four story building in Chicago, occupied by about twenty tenants. On March 23, 1922, he leased certain space on the second floor to the Lemon Manufacturing Company at a rental of $200.00 per month. The rent was paid to August 1, but was not paid for August, September and October. On October 14th, a distress warrant was issued for $497.60 and levied on four large punch presses and one milling machine. A copy of the warrant was served on an officer of the corporation, and a copy was attached to each of the machines levied upon, which copies remained on the machines until they were taken from the building by the receiver. The machines were heavy, weighing in excess of one ton each, and were not capable of being moved without considerable expense.

They were not removed from the premises. The Lemon Manufacturing Company retained keys to the premises and continued to have access thereto. Thomas DeBray was the engineer in charge of the building, and was appointed by appellant as his agent to levy the distress warrant. He retained keys to the premises occupied by the Lemon Manufacturing Company and at all times had access to the rooms occupied by these machines up to the time the receivers were appointed. The building was equipped with a large freight elevator and a passenger elevator operated by electricity generated on the premises. The machines could only be removed from the building by means of the freight elevator. DeBray had charge of the operation of the generators and of the elevators. He was at the building during the daytime and a watchman was in charge at night. The watchman was instructed that the distress warrant had been levied. Neither of the elevators could be operated without the knowledge of DeBray during business hours and during the night the current was shut off so they could not be operated. The distress warrant was levied at about 11 o'clock in the forenoon on Saturday. The municipal court was not open on Saturday afternoon, but on the following Monday morning, a copy of the distress warrant was filed in the office of the clerk of the municipal court of Chicago and a summons was placed in the hands of a bailiff for service.

On October 10, 1922, the bill in the present case was filed in the circuit court of Du Page county. On October 26, 1922, John H. Grant and Herbert A. Grotefeld were appointed receivers of the Lemon Manufacturing Company and duly qualified as such. On November 15, 1922, the receivers reported to the court that immediately after filing their bond, they went to the premises and found no one in possession. They found the notice posted upon the machines. They made an inventory of the property which they filed in court. They reported that the rent had not been paid for August, September and October and the landlord claimed a lien for the rent due; that litigation would unduly delay final distribution; that the assets were not large

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The building was equipped with a large freight elevator and a
passenger elevator operated by electricity generated on the premises.
The machines could only be removed from the building by means of the
freight elevator. Debrey had charge of the operation of the generator
and of the elevators. He was at the building during the daytime
and a watchman was in charge at night. The watchman was instructed
that the distress warrant had been levied. Neither of the elevators
could be operated without the knowledge of Debrey during business
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and the landlord claimed a lien for the rent due; that litigation
would unduly delay final distribution; that the assets were not large

and did not warrant the keeping of a custodian in charge; that the assets should be removed to a warehouse; that the storage charges would not amount to as much as the rent. On the same day an order was entered, directing the receivers to remove the property to a warehouse. The order provided that such removal should be without prejudice to any lien the appellant might have as landlord, and that such a lien, if any he had, should follow the property and be subject to enforcement the same as if no removal had been ordered. The receivers also reported that they had changed the locks upon the doors and they had not given a key to any other person. DeBray testified he had a key to the new locks and continued to have access to the premises after the receivers took charge. He testified it was necessary for him to have access to all parts of the building as he had charge of the sprinkling system, and that he could gain access to the premises from the elevator shaft when no other means were afforded.

The distress warrant was for $697.60, but it is admitted that $97.60 of this was for electric power furnished. After the levy, $200.00 was paid and accepted by appellant, leaving $497.60 still due. The receivers remained in possession during November and $200.00 additional rent became due which was allowed in full as a preferred claim. The court allowed $497.60 as a general claim but refused to allow it under the distress warrant and the question for review is as to the correctness of that action.

It is insisted by appellant that he levied a distress warrant, which was valid under the law, took possession of the property, filed the distress warrant in court as provided by statute and was entitled to the lien. Appellee contends that appellant did not make a valid levy as required by statute, that if he did make a levy he did not keep it in force and effect, and that the levy as made was merely a pen and ink levy and had no legal effect.

The question as to what acts are necessary to constitute a valid levy upon personal property has been before the courts on many

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The distress warrant was for $697.60, but it is admitted that $97.60 of this was for electric power furnished. After the levy, $600.00 was paid and accepted by appellant, leaving $497.60 still due. The receivers remained in possession during November and $800.00 additional rent became due which was allowed in full as a preferred claim. The court allowed $497.60 as a general claim but refused to allow it under the distress warrant and the question for review is as to the correctness of that action.

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The question as to what acts are necessary to constitute a valid levy upon personal property has been before the courts on many

occasions. It was first determined by the Supreme Court in the early case of Minor vs. Herriford, 25 Ill. 344, and it was there held that the property must be within the power and control of the officer when the levy is made, and he must take it into his possession in a reasonable time thereafter in such an open, public and unequivocal manner as to notify everybody that the property has been taken on execution. He must so deal with the property in order to constitute a good levy, that without the protection of an execution his acts would make him a trespasser. This rule was followed in Davidson vs. Waldron, 31 Ill. 120, and Windmiller vs. Chapman, 139 Ill. 163. In Crittenden vs. Rogers, 42 Ill. 100, it was held that the officer must either reduce the property to possession or at least bring it within his control. What acts are nedessary to bring the property into possession or under the control of the officer may depend upon the character of the property and the place where it is located. If the property is small and easily moved it is the duty of the officer to actually take possession and exercise dominion over it. If the property is large and heavy he has to be governed by the conditions surrounding it. In the case at bar the levy did not cover all the property of the Lemon Manufacturing Company. It was therefore impossible for appellant to lock the rooms and take all of the keys. Such an act would have amounted to an eviction and trespass for which appellant would have been liable in damages. On the other hand appellant could not move the machines without great trouble and expense. The facts surrounding the levy were peculiar. Appellant was the owner of the premises in which the property was located. He had the keys to the rooms and had free access thereto. Through his agents he had control of the elevator by which the property must be moved. His agents were there at all hours of the day and night. Under these circumstances it seems hardly necessary that he should be required at great expense to move them in order to constitute a valid levy, especially between the parties. He posted notices of his levy upon

[illegible]

[illegible] It was first determined by the Supreme Court in the early case of Minor vs. Merrifield, 36 Ill. 344, and it was there held that the property must be within the power and control of the officer when the levy is made, and he must take it into his possession in a reasonable time thereafter in such an open, public and unequivocal manner as to notify everybody that the property has been taken on execution. He must so deal with the property in order to constitute a good levy, but without the protection of an execution his acts would make him a trespasser. This rule was followed in Davidson vs. [illegible], 21 Ill. [illegible]. [illegible] Ill. [illegible] [illegible] or under the control of the officer may depend upon the [illegible] of the property and the place where it is located. If the property is small [illegible] take possession and exercise dominion over it. If the property is large and [illegible] he has to be governed by the conditions surrounding it. In the case at bar the levy did not cover all the property of the Lemon Manufacturing Company. It was therefore impossible for appellant to look the rooms and take all of the keys. [illegible] would have amounted to an eviction and trespass for which appellant would have been liable in damages. On the other hand appellant could not move the machines without great trouble and expense. The facts surrounding the levy were peculiar. Appellant was the owner of the premises in which the property was located. He had the keys to the rooms and had free access thereto. Through his agents he had control of the elevator by which the property must be moved. His [illegible] there at all hours of the day and night. Under those circumstances it seems hardly necessary that he should be required at great expense to move them in order to constitute a valid levy, [illegible]

the machines which remained until they were removed by the receivers. He notified an officer of the corporation of his actions. He filed his distress warrant in court and had summons issued against the owners. He in fact did all he could do except to move the property from the premises. In Richardson vs. Rardin, 88 Ill. 124, the levy was on a large quantity of corn in a drib. When the levy was made the defendant in the execution was at the crib getting a load of corn. It was served on him and demand made that he turn out his property. The constable endorsed the levy, nailed boards on the crib, and gave public notice in the presence of several persons that he had made the levy. He personally notified appellant who was the purchaser that he had made the levy. The court said, "The constable, very clearly, did that which, but for the protection of his writ, would have made him a trespasser. Not only was the nailing of the boards on the crib an act which, if unauthorized, amounted to a trespass, but it would also seem that the actual dominion which he exercised over the property in prohibiting its use by the defendant in execution and others, might be regarded as constituting, if unauthorized, a trespass. (Cited cases) It would undoubtedly have been better had the constable, after making the levy and nailing up the crib, placed a notice on the crib that the corn was levied upon; yet this would have afforded appellant no more knowledge than he had that the levy was made. It does not seem there could have been any doubt, from the facts proved, but that notice of the levy had sufficient publicity given to it. At all events we are of the opinion appellant, having actual notice of the levy when he acquired the property, is in no position to complain that sufficient publicity was not given to it." In that case the constable nailed a board across the crib but posted no notice. In the case at bar notices were posted and were served on the parties interested so there can be very little distinction in the two cases when the facts surrounding each are taken into consideration.

The order of the court for the removal of the machines provided that the removal should be without prejudice to any lien appellant

might have as landlord, and such lien, if he had any, should follow the property and be subject to enforcement the same as if the machines had not been removed. The receivers, therefore, had the same rights which the Lemon Manufacturing Company had, and the question at issue here is therefore between debtor and creditor, or landlord and tenant. If the levy was valid between landlord and tenant, appellant should have been given a lien. In 24 Cyc 1294, it is said, "As a general rule to render a distress complete there must be a seizure of the property distrained upon; but a very slight act is sufficient to constitute a seizure in contemplation of law; it need not be an actual seizure. Thus a landlord declares certain goods which he names shall not be removed, or if he goes on the premises where the tenant's goods are, makes an inventory of them, puts up a notice of distress, and serves the notice on the tenant, such acts have been held a sufficient seizure to constitute distress." In Logsdon vs. Spivey, 54 Ill. 104, an execution was levied on a quantity of corn in a crib which was not removed and a custodian was not appointed. The corn had been taken by the landlord for rent and was also claimed under an execution in favor of another party whose rights he had previously acquired. No sale was made under the execution. The court instructed the jury that the levy had ceased to be a lien after the expiration of ten days from the date of the levy, and the court was considering whether the instruction was correct and said, "But in this case it is not a conflict between executions or creditors, but simply between the creditors and the representatives of the deceased debtor. The question arises whether, in such a case, the same, or a different rule must be applied. * * * If the officer makes a levy, and then constitutes the debtor a custodian, the debtor, or those claiming under him, will not be heard to say the levy was invalid because the officer failed to remove the property and deprive the debtor of its custody. In such a case it is like a defectively executed chattel mortgage, which is binding between the parties, but is void as to creditors and purchasers. Although the

constable in this case failed to reduce the crib of corn to actual possession by removal or to place it in the care of a custodian, the debtor could not deny that it was a valid levy, nor can his representative take it with a better title than he held. If then appellant received the property from the constable by virtue of a levy, he could justify under the levy, and as the bailee of the constable, if the execution remained unsatisfied." In Davidson vs. Waldron, 31 Ill. 120, it is said, "So far as the debtor himself is concerned, the levy may be good, but we are trying the case with reference to the rights of third persons in view of the rule established by this court in Minor vs. Herriford before cited." It is apparent from these authorities that even if it be held that the distress warrant in this case was not levied in strict conformity with the law, yet as between landlord and tenant it was sufficient. We therefore hold that as between the appellant and his tenant this was a valid levy of the distress warrant; that the receiver occupied the same position which the landlord had occupied; that the appellant did not abandon his levy; that the court was in error in decreeing that the appellant was not entitled to a lien for $400.00 rent due.

For the reasons indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

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For the reasons indicated the judgment will be reversed and the [illegible]

[illegible] Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of March in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson

*Clerk of the Appellate Court.*

57 (Cont.)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

236 I.A. 649

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Herbert Page Beers,

appellee,

vs.

Board of Education District No. 44, Du Page County,

appellant,



Appeal from the Circuit Court of DuPage County.

Partlow, J.

In the circuit court of DuPage county appellee, Herbert Page Beers, obtained a judgment for $410.00 against appellant, the Board of Education of School District No. 44, Du Page county, being a balance alleged to be due under a contract for services as an architect, and this appeal followed.

On January 16, 1916, appellant and appellee entered into a written contract by the terms of which appellee agreed to prepare plans and specifications for a school building to be erected by appellant. Appellee was to receive bids, supervise the erection of the building, issue certificates, and perform all other duties usually performed by an architect on similar work. He was to receive five per cent of the final cost not including items which did not come under his supervision, payable one-fifth when the preliminary plans were drawn, two-fifths when bids were received, and the remainder upon completion and acceptance of the building. Appellee prepared the plans, bids were received, the contract was let, and the work was begun. Appellate did not have enough money to complete the building. After the contract had been let, appellant was able to get more money and some of the omitted work was let. Finally the walls were up, the windows in, the roof was on, the gymnasium and basement were in service but were not completed. The work progressed until the summer of 1917, when appellant claimed to be out of money and the work was suspended. There remained unfinished the gymnasium, two second story class rooms, the stairway leading to the second story, two wings and the swimming pool. When the work was suspended, appellant issued a voucher to appellee which recited that it

Filed:

Herbert Page Beers,

appellee,

vs.

Board of Education District

No. 44, Du Page County,

appellant,

Appeal from the Circuit Court

of DuPage County.

236 I.A. 649

Latitur, J.

On the circuit court of DuPage county, appellee, Herbert Page Beers, obtained a judgment for $[illegible] against appellant, Board of Education of [illegible] District No. 44, Du Page county, [illegible] allegedly [illegible] a contract [illegible] architect, [illegible] contract [illegible].

On January 16, 1916, appellant and appellee entered into a written contract by the terms of which appellee agreed to prepare plans and specifications for a school building to be erected by appellant. Appellee was to receive bids, supervise the erection of the building, [illegible] architect, [illegible] and [illegible] to receive five per cent of the final cost not including items which did not come under his supervision, [illegible] were there. [illegible] completion and acceptance of the building. Appellee prepared the plans, bids were received, the contract was let, and the work was begun. Appellant did not have enough money to complete the building. After the contract had been let, appellant was able to get more money and some of the omitted work was let. Finally the walls were up, the windows in, the roof was on, the gymnasium and basement were in service but were not completed. The work progressed until the summer of 1917, when appellant claimed to be out of money and the work was suspended. There remained unfinished the gymnasium, two second story class rooms, the stairway leading to the second story, two wings and the swimming pool. When the work was suspended, appellant issued a voucher to appellee which recited that it

was for the balance in full under the contract. The work remained uncompleted until 1921, when appellant proceeded to finish the building. Appellant did not call upon appellee to finish his work, but used his plans and specifications and employed a man by the name of Shane, who had been in appellee's office at the time the plans were drawn. The aggregate amount of the work let under the subsequent contract was between $10,000.00 and $15,000.00. When appellee discovered that the work had been completed and his plans and specifications had been used without any arrangement being made with him, he demanded the balance due him on his contract. Appellant refused to pay, and this suit was commenced.

As ground for reversal, it is urged that the appellant, as constituted in 1916, could not enter into a contract the part performance of which was indefinitely postponed, which would be binding upon its successor in 1921 as to the unperformed portion; that the contract was void as to any excess of cost of the building over and above the constitutional limit of indebtedness of the district. Under this head, it is claimed that the contract, as finally awarded, exceeded the constitutional limitation of debt as provided by statute; that the acceptance of the final voucher by appellee with the accompanying statement that the same was issued in full settlement of all claims and demands was a complete bar to a recovery; that the court gave erroneous and misleading instructions.

No question as to the instructions was raised in the motion for a new trial and cannot be raised for the first time in this court. As to the other grounds of reversal we do not deem it necessary to consider each in detail. It is undisputed that the parties entered into a contract and appellee prepared plans and specifications and did his part of the work. No contention can be raised in this case as to the validity of the contract for the reason that all the work performed thereunder prior to the suspension in 1917 had been paid for in full. If nothing further had been done there could be no question about the sufficiency of the contract. It is conceded that the plans and specifications prepared by appellee were

was for the balance in full under the contract. The work remained [illegible] building. [illegible] did not call upon appellee to finish his work, but used his plans and specifications and employed a man by the name of Shane, who had been in appellee's office at the time the plans were drawn. The aggregate amount of the work let under the subcontract contract was between $10,000.00 and $12,000.00. When appellee discovered that the work had been completed and his plans [illegible] [illegible].

As ground for reversal, it is urged that the appellant, as constituted in 1916, could not enter into a contract the part performance of which was indefinitely postponed, which would be [illegible] upon its successor in 1922 as to the unperformed portion; that the contract was void as to any excess of cost of the building over and above the constitutional limit of indebtedness of the district. Under this head, it is claimed that the contract, as [illegible] awarded, exceeded the constitutional limitation of [illegible] as to the other grounds of reversal we do not deem it necessary to consider each in detail. It is undisputed that the parties entered into a contract and appellee prepared plans and specifications and did his part of the work. No contention can be raised [illegible] as to the validity of the contract for the reason that the work performed thereunder prior to the suspension in 1917 had been paid for in full. If nothing further had been done there could be no question about the sufficiency of the contract. It is [illegible] that the plans and specifications prepared by appellee were

his property and were the result of his labor. When work ceased in 1917, he made a demand on appellant for these plans and specifications and appellant refused to deliver them. In 1921, when appellant again resumed work, it used the plans and specifications which had been prepared by the appellee, without his knowledge or consent. There is some evidence that attempts were made to disguise these plans and erase appellee's name therefrom. Appellant accepted the fruits of the labor of appellee for which he was entitled to compensation under his contract. If appellant did not care to pay the balance due under his contract, they should not have used the plans and specifications, but, having used them, aside from all other questions in the case, we think appellant is liable for the amount of this judgment. Appellee was to receive five per cent of the cost and the evidence shows the work performed subsequent to 1917 was of the value of between $10,000.00 and $15,000.00, and at the lowest estimate the jury gave him only what he was entitled to recover.

The judgment will be affirmed.

Judgment affirmed.

work for the Wilkens . . . .

his property and were the result of his labor. When work ceased in 1917, he made a demand on appellant for these plans and specifications and appellant refused to deliver them. In 1921, when appellant again resumed work, it used the plans and specifications which had been prepared by the appellee, without his knowledge or consent. There is some evidence that attempts were made to disguise these plans and erase appellee's name therefrom. Appellant accepted the fruits of the labor of appellee for which he was entitled to compensation under his contract. If appellant did not care to pay the balance due under his contract, they should not have used the plans and specifications, but, having used them, aside from all other questions in the case, we think appellant is liable for the amount of this judgment. Appellee was to receive five per cent of the cost and the evidence shows the work performed subsequent to 1917 was of the value of between $10,000.00 and $15,000.00, and at the lowest estimate the jury gave him only what he was entitled to recover. The judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of March in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson
*Clerk of the Appellate Court.*

3 (Oct)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

236 I.A. 649

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

---

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The First United Evangelical Church
of Highland Park, Illinois,

Appellee,

vs.

J. H. Keagle,

Appellant.

Appeal from the Circuit
Court of Lake County.

236 I.A. 649

Partlow, J.

Three of the five trustees of appellee, the First United Evangelical Church of Highland Park, Illinois, began an action of forcible entry and detainer against appellant, J. H. Keagle, before a justice of the peace to secure the possession of the parsonage connected with the church of which appellant had been pastor. An appeal from the judgment of the justice was prosecuted to the circuit court of Lake county, where appellee was substituted as party plaintiff. A jury was waived and upon a trial before the court judgment was rendered in favor of appellee for the possession of the property, and this appeal followed.

In 1816, the Evangelical Association, a religious organization, was formed. In 1890, there was a division in the church resulting in two organizations, one known as the Evangelical Association and the other as the United Evangelical Church. Both churches prospered and grew in numbers. Two churches existed side by side in Highland Park, the Ebenezer Church affiliated with the Evangelical Association, and the First United Evangelical Church affiliated with the United Evangelical Church. In both of these denominations, in the selection of pastors, the itinerant system was adopted. The pastors were appointed each year by the annual conference, the power of assignment being in the bishops and presiding elders.

Appellant, J. H. Keagle, in 1920, was appointed by the Illinois Conference of the United Evangelical Church to the First United Evangelical Church of Highland Park. He was re-appointed in 1921 and 1922. The conference had nothing to do with fixing his salary or with the question of his occupying the parsonage. Both of these questions were

The First United Evangelical Church
of Highland Park, Illinois,

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In 1816, the Evangelical Association, a religious organization, was formed. In 1800, there was a division in the church resulting in two separate sections, one known as the Evangelical Association and the other as the United Evangelical Church. Both churches prospered and grew in numbers. Two churches existed side by side in Highland Park, the former Church affiliated with the Evangelical Association, and the First United Evangelical Church affiliated with the United Evangelical Church. In both of these denominations, in the selection of pastors, the itinerant system was adopted. The pastors were assigned each year by the annual conference, the power of assignment being in the bishops and presiding elders.

Appellant, J. H. Keagle, in 1920, was appointed by the Illinois Conference of the United Evangelical Church to the First United Evangelical Church of Highland Park. He was re-appointed in 1921 and 1922. The conference had nothing to do with fixing his salary or with the question of his occupying the parsonage. Both of these questions were

determined by the quarterly conference of the local church, which consisted of the presiding elder, and the various class leaders of the local church. For the year 1921, his salary was $1300 and the use of the parsonage. For 1922 it was $1500 and the use of the parsonage, and for the year ending 1923 it was $1800 and the use of the parsonage. The conference year began on April 1, and ended on March 31, of the next year.

Several years prior to 1922, negotiations had been in progress for the union of the two churches which had divided in 1890. Finally in October, 1922, the general conference of the two denominations met simultaneously, ratified the union, and the two churches were re-united under the name of the Evangelical Church. Appellant was appointed as the pastor of the appellee church at Highland Park for the year beginning April 1, 1923. There was discord and dissension in the congregation of appellee with reference to this union. A portion of the congregation ignored the merger and refused to recognize it, and two factions arose in the church. The faction claiming to be the church refused to permit appellant to preach in the church. They closed the church the last Sunday in March, and on Easter Sunday, April 1, 1923, when appellant went to the church to hold services, they prevented him from occupying the pulpit. As a result of this action, a part of the congregation of appellee withdrew from the church, and with appellant went to the Ebenezer Church where they held services. Those remaining in the United Evangelical Church had a pastor sent them from a conference called the East Pennsylvania Conference of the United Evangelical Church, which was also opposed to the merger. This pastor held services in the First United Evangelical Church beginning April 1, 1923, and continuing until the present time.

There were five trustees of appellee at the time of this trouble but one of them resigned and another left the church. The three remaining trustees began this suit in their own names as trustees of appellee against appellant. Later the vacancies were filled and a resolution was passed by the congregation of appellee approving the action of the trustees in beginning this suit and authorizing them, either alone, or in connection with the two newly elected trustees,

[illegible] ly conference of the local church, which [illegible] of the preaching elder, and the various class leaders of [illegible] church. For the year 1921, his salary was $1300 and the use [illegible] parsonage. For 1922 it was $1500 and the use of the parsonage, [illegible] the year ending 1923 it was $1800 and the use of the par[illegible] [illegible] conference year began on April , and ended on March 31, of the next [illegible].

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to prosecute the case. On the trial in the circuit court it was suggested that the suit could not be maintained in the name of the trustees and the court permitted a substitution of plaintiffs, and judgment was rendered in favor of appellee for the possession of the parsonage.

It is urged by appellant that the three trustees did not represent appellee and had no authority to bring the suit under the name of a majority of the trustees; that they were seceders from the church and represented only one group of seceders; that the church continued to be a part of the merged church and will so continue until steps are taken to dissolve the relationship in accordance with the discipline and rules governing that ecclesiastical body; that appellant is the lawful pastor of appellee, and he had authority as such pastor to occupy the parsonage; that his occupancy of the parsonage was the occupancy of the appellee, and to oust him from the premises is in fact an ouster of appellee; that the vital question is which faction is the First United Evangelical Church of Highland Park, and which faction adhered to the tenets and discipline of the organization. It is also insisted that the notice served by the trustees before the commencement of this suit was not sufficient to entitle appellee to a recovery.

Civil courts are bound by the adjudication of ecclesiastical courts as to which of the contending factions in a church is the true representative of the church and which faction is outside of and beyond the pale of the church, and whether a merger of two churches or a division of a church is in accordance with the ecclesiastical laws of the organization. Presbyterian Church vs. Cumberland Presbyterian Church, 245 Ill. 74. Civil courts will accept the decision of the highest tribunal of the church upon questions of faith and doctrine, and where the ownership of property is dependent upon the decisions of such question, the civil courts will follow the construction of the ecclesiastical tribunal; but a different rule applies where property rights are involved which are not dependent upon any questions of faith or doctrine. When the property rights are not dependent

upon any question of faith or doctrine, the decision of the ecclesiastical bodies will not be accepted by the courts, but the questions will be settled according to the rules of law. Marie Church vs. Trinity Church, 253 Ill. 21. The title to church property in case of a division of a religious corporation, generally remains with that portion of the church which adheres to the tenets and discipline of the organization to whose use the property was originally dedicated even though that part of the church may be in the minority. Terraria vs. Vasconelles, 23 Ill. 456. Christian Church vs. Church of Christ, 219 Ill. 503. When the members of a church society secede and join another organization, such act does not affect the property rights or the identity of the whole society if there still remain any members adhering to and teaching the doctrines of the original church. Stillings vs. Finney, 287 Ill. 146. When a deed of trust for the benefit of a church society contains no express declaration of trust for the general body of the church, the right of control and use of the property is vested solely in the membership of the organization. Illinois Classes of the Reformed Church vs. Halbin, 286 Ill. 472.

The controversy in this case must be decided on the authorities above quoted, and the case last cited is, in a large measure, controlling under the facts here presented. The deed to this property contained no declaration of trust for the general body of the church but it was to trustees for the benefit of the church society. The right of control and use of the property was in the membership of the congregation which remained in possession. The deed to appellee was dated January 2, 1896. It was from Harvey B. Hurd and wife of Evanston, Cook County, to the First United Evangelical Church of Highland Park, After the description the deed contained the following recital: "To be held as a place of worship for the use of said congregation, subject to the control of a majority of the members of said congregation in good standing. All adult persons whose names have been on the church record at least one year, and who have contributed regularly to the maintenance of the congregation and have communed during said year shall be considered members in good standing, providing, however, that said congregation adhere to the faith of the United Evangelical Church, and that congre-

upon any question of faith or doctrine, the decision of the ecclesiastical bodies will not be accepted by the courts, but the questions will be settled according to the rules of law. Mathis Church vs. [illegible] Church, 288 Ill. 21. The title to church property in case [illegible] of a religious corporation, generally remains with that [illegible] of the church which adheres to the tenets and discipline of [illegible] to whose use the property was originally dedicated [illegible]

[illegible] Chalies, 28 Ill. 486. Christian Church vs. Church of Christ, [illegible] 508. When the members of a church society secede and join [illegible] organization, such act does not affect the property rights or [illegible] of the whole society if there still remain any members [illegible] to and teaching the doctrines of the original church. [illegible] vs. Kinney, 287 Ill. 146. When a deed of trust for the [illegible] of a church society contains no express declaration of trust [illegible] general body of the church, the right of control and use of [illegible] property is [illegible]

[illegible] Diocese of the Reformed Church vs. Baldwin, 286 Ill. 472.

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gational actions affecting or dissolving, or intending to affect or dissolve the ecclesiastical relations or connections of the congregation, can be taken only in the month preceding the regular session of the annual conference of the United Evangelical Church within whose bounds this property is located; such meeting is to be announced two successive Sundays at the place of public worship, stating the purpose for which the congregation is to be convened. A congregation thus convened can, by a vote of two-thirds, the ayes and nays being taken, determine any question of ecclesiastical connection, notice of which action shall be given to the annual conference at the next regular session. And provided further, that no ecclesiastical relation of this society or congregation shall limit the free and entire control of its property, the authority of disposal being vested in the board of trustees acting upon authority of said First United Evangelical Church of Highland Park, Lake County, Illinois."

It is not necessary to consider the question of the validity of the merger of these two organizations, for the reason that the determination of the property rights must be based entirely upon these provisions of this deed. This deed was not to the organization as a whole. It was expressly to the church of Highland Park, and the title to the property was vested exclusively in the trustees of that organization. They have power and authority to handle it and dispose of it as they see fit, subject to the directions of the congregation. In this respect there is a distinction between a church as an organization, and the building in which the services are held. Rock River Conference vs. Trinity M. E. Church, 192 Ill. App. 204. There is nothing in the discipline or in any other document offered in evidence which makes the property of appellee depend upon any action of either the general or annual conference of the church. This church owns this property, and it was only affiliating in an ecclesiastical way with the general church. Even this ecclesiastical relation could be changed by a two-thirds vote, in accordance with the provisions of the deed. This local congregation, as far as its property rights were concerned under this deed, had the right to join any other denomination it might

political affiliation--Presiding officer--Quorum--Amendment to minutes--
dissolve the ecclesiastical relations or connections of the congre-
gation, can be taken only in the month preceding the regular session
of the annual conference. Evangelical church within
[illegible] such meeting is to be announced
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for which the congregation is to be convened. A congregation thus
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session. [illegible]
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The [illegible]
[illegible]

choose, provided it complied with the provisions of the deed. hen the merger took place a part of the congregation of appellee, together with the pastor, withdrew and went to the other church building and there held services. Those who did not withdraw continued in possession of the church and parsonage and continued religious services. They perfected their orgainzation, selected a new pastor and have held regular church services. They have not changed their religious doctrine, but have steadfastly refused to change and have adhered to the doctrine which was in existence at the time the deed was executed. Under this deed appellee, represented by its trustees, was entitled to the possession of this property and the judgment of the trial court was correct.

It is insisted by appellant that the trustees of appellee did not serve a sixty day notice before commencing suit as provided by statute. Appellant was not a tenant from year to year. He was the pastor of the church, and in addition to his salary as pastor he was permitted to occupy the parsonage. His holding of the premises was merely an incident of his employment as pastor. When his employment ceased his right to hold the premises also terminated and he was not entitled to sixty days notice to vacate the premises. In Mead vs. Pollock, 99 Ill. App. 151, a housekeeper in the employ of a family occupying a rented house, remained in the house with her goods after the expiration of the lease and the removal of the family. The landlord removed her goods and she sued for damages. The court held that her right to occupy and remain in the premises was like that of a lady employed by a family as housekeeper. On page 154 the court said "The lease having been terminated by agreement, her remaining in the premises was a trespass, and the goods which she had therein, the defendants had a right to remove, if they could do so without actual violence, using no unnecessary force and doing no unnecessary harm to any of her belongings," citing cases. On page 156 the court said "When occupation of a house by a servant is connected with the service, or is required by the employer for the necessary or better performance of the service, the occupation is as a servant, not as a tenant, and the purpose is that of the master. Chatard Bishop vs. O'Donovan, 80 Ind. 20; Kerrains vs. People, 60 N. Y. 221; Woodfall on Landlord and Tenant, 246." To the same effect are Bristor vs. Burr, 120

[illegible], provided it complied with the provisions of the deed. When the [illegible] took place - part of the congregation of appellee, together with the [illegible]or, withdrew and went to the other church building and there held services. Those who did not withdrew continued in possession of the church and parsonage and continued religious services. They perfected their organization, selected a new pastor and have held regular church services. They have not changed their religious doctrine, but have steadfastly refused to change and have adhered to the doctrine which was in existence at the time the deed was executed. Under this [illegible], represented by its trustees, was entitled to the possession of this property and the judgment of the trial court was correct.

It is insisted by appellant that the trustees of appellee did not [illegible] a [illegible] provision [illegible] was not a tenant from year to year. He was the pastor of the church [illegible] by the parsonage. His holding of the premises was merely an incident of his [illegible].

[illegible] notice to vacate the premises. In Moss vs. Wolfock, 90 Ill. App. 181, a housekeeper in the employ of a family occupying a rented house, remained in the house [illegible] removal of the family. The landlord removed her goods and she sued for damages. The court held that her right to occupy and remain in the premises was like that of a lady employed by a family as housekeeper. On page 184 the court said "The lease having been terminated by agreement, her remaining in the premises was a trespass, and the goods which she had therein, the defendants had right to remove, if they could do so without actual violence, using no unnecessary force and doing no unnecessary harm to any of her belongings." citing cases. On page 178 the court said "When occupation of a house by a servant is connected with the service, or is required by the employer for the necessary or better performance of the service, the occupation is as a servant, [illegible] a tenant, and the purpose is that of the master. Ghetsel Bishop vs. O'Donovan, 80 Ind. 80; Kerrains vs. People, 60 N. [illegible] 281; Woodfall on Landlord and Tenant, 246." To the same effect are Brister vs. Burr, 120

N. Y. 427; East Norway Conference vs. Froisle, 37 Minn. 447; Duessel vs. Proch, 78 Conn. 343,

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of March in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson
*Clerk of the Appellate Court.*

Rehearing denied April 9, 1925.
7438.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:



Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Henry Dittmar, Administrator of the estate of John Dittmar, deceased,
Appellee,

vs

William G. Bancroft and Fred G. Evans,
Appellants.

236 I.A. 649

Appeal from the Circuit Court of Jo Daviess County.

Partlow, J.

Appellee, Henry Dittmar, administrator of the estate of John Dittmar, deceased, began an action of assumpsit in the circuit court of Jo Daviess County against William G. Bancroft, and appellant, Fred G. Evans, upon a promissory note for $2500.00, dated March 1, 1919, purporting to be signed by Bancroft and Evans, payable to John Dittmar. Appellant Evans filed the general issue and a verified plea denying that he executed the note. Bancroft filed the general issue and a plea in which he alleged that he had been adjudged a bankrupt; that the bankrupt proceedings were still pending and that the note upon which the suit was based had been filed as a provable claim against his estate. There was a trial by jury and at the close of all of the evidence the court, on motion of Bancroft, entered an order staying the cause as to him for one year, or until he was discharged in bankruptcy. The jury returned a verdict against Evans for $2692.08. Judgment was rendered upon the verdict, and this appeal was prosecuted.

Walter J. Ehler, a witness called on behalf of appellee, testified that he was post-master of Galena and had been circuit clerk of Jo Daviess county; that he saw Evans sign exhibits 3 and 4; that the signature on the note looked like the signature of Evans; that he thought perhaps it was his signature just from his recollection of what the signature was; that in his opinion it was the genuine signature of Evans. All this evidence was admitted without objection as far as the abstract shows. On cross-examination he testified that his opinion was formed by a comparison of the signatures on exhibits

[illegible]

[illegible] Dittmer, Administrator of [illegible] estate of John Dittmer, de-[illegible]d,

Appellee,

[illegible]

[illegible] G. Bancroft and Fred G. [illegible],

Appellants.

[illegible]

Appellee, [illegible] Dittmer, deceased, [illegible] of Davieess County against William G. Bancroft, and appellant, Fred E. Evans, upon a promissory note for $2500.00, dated March 1, [illegible], payable to the order of Jacob [illegible] John Dittmer. [illegible] plea denying that he executed the note. Bancroft filed the [illegible] that the [illegible] the note upon which the suit was based had been filed as a provable claim against his estate. There was a trial by jury and at the close of all of the evidence the court, on motion of Bancroft, entered an order requiring the cause as to him for one year, or until he was discharged in bankruptcy. The jury returned a verdict against Evans for $2500.00. Judgment was rendered upon the verdict, and this appeal was prosecuted.

[illegible] was post-master of [illegible] and had been [illegible] of Davieess county; that he saw Evans sign exhibits 3 and 4; that he [illegible] on the note looked like the signature of Evans; that he [illegible] perhaps it was his signature just from his recollection of [illegible] the signature was; that in his opinion it was the genuine signature of Evans. All this evidence was admitted without objection as [illegible] the abstract shows. On cross-examination he testified that [illegible] was formed by a comparison of the signatures on exhibits

3 and 4 with the signature on the note. Evans then moved to strike out all of the testimony of this witness which motion was overruled and this ruling is assigned as error. The motion was not limited to any particular part of the evidence but it was to exclude all the evidence of this witness. Appellant was not entitled to have all of this evidence excluded. In fact he was not entitled to have any of it excluded. The witness testified that in his opinion this was the genuine signature of Evans. How frequently a witness has seen a person write, or how well he was acquainted with a signature, are matters that go to the weight of the testimony rather than to its competency. It was a question for the jury to say what weight should be given to this testimony and it was not the province of the court to exclude it.

Carson Scott, a witness called by appellee, testified that he was circuit clerk of Jo Daviess County, and prior to that he had been a deputy county clerk; that he had transacted business with Evans as supervisor for over a year; that he was acquainted with his signature; that he thought the signature to the note was the signature of Evans. On cross-examination, counsel for Evans marked several papers as exhibits and undertook to cross-examine the witness as to the signatures on these papers. Objection was made and sustained and that ruling is assigned as error. The cross-examination was not as to any paper in the case and was not on any matter about which the witness had been asked upon direct examination. The objection was properly sustained.

E. J. Menzemer, county clerk, testified that he had known Evans twenty-five years; had transacted business with him as supervisor, was familiar with his hand writing, and knew his signature; that he thought the signature to the note was the signature of Evans; that it looked like his signature; that it resembled his signature. Appellant moved to strike out all of this evidence. The motion was overruled and this ruling is assigned as error. [illegible]. J. Shipton, county treasurer, testified that he was familiar with the hand writing of Evans and in his opinion the signature on the note

3 and 4 with the signature on the note. Evans then move d to strike out all of the testimony of this witness which motion was overruled, and this ruling is assigned as error. The motion was not limited to any particular part of the evidence but it was to exclude all the evidence of this witness. Appellant was not entitled to have all of his evidence excluded. In fact he was not entitled to have any of it excluded. The witness testified that he was familiar with the genuine signature of Evans. How frequently a witness has seen a person write, or how well he was acquainted with a signature, are matters that go to the weight of the testimony rather than to its competency. It was a question for the jury to say what weight should be given to this testimony and it was not the province of the court to instruct it.

Carson Scott, a witness called by appellee, testified that he was circuit clerk of Jo Daviess County, and prior to that he had been a county clerk; that he had transacted business with Evans as county clerk for over a year; that he was acquainted with his signature; that he thought the signature to the note was the signature of Evans. On cross-examination, counsel for Evans marked several papers as exhibits and undertook to cross-examine the witness as to the signatures on these papers. Objection was made and sustained and that ruling is assigned as error. The cross-examination was not as to any matter in the case and was not on any matter about which the witness had been asked upon direct examination. The objection was properly sustained.

E. J. Menzemer, county clerk, testified that he had known Evans twenty-five years; had transacted business with him as county treasurer, was familiar with his hand writing, and knew his signature; that he thought the signature to the note was the signature of Evans; that it looked like his signature; that it resembled his signature. Appellant moved to strike out all of this evidence. The motion was overruled and this ruling is assigned as error. J. E. Williams, county treasurer, testified that he was familiar with the hand writing of Evans and in his opinion the signature on the note

was the signature of Evans. On cross-examination he testified that in his opinion the signature to the note resembled the signature of Evans. The court overruled the motion to strike out this evidence and this ruling is assigned as error. We do not think either of these motions was improperly overruled. Both of the witnesses testified they were acquainted with the handwriting of Evans. The mere fact that their testimony was not as positive as counsel for appellant might desire did not justify its exclusion. It was competent and was of such a nature that the court could not strike it out without having committed error.

Appellant contends that the verdict is contrary to the evidence. The most that can be said as to the evidence is that it was in conflict. Witnesses of prominence, called on each side, did not agree as to whether the signature to the note was that of Evans. An expert witness called by appellant went into great detail in pointing out the differences between the signature to the note and the signature of Evans to documents offered in evidence which were admitted to contain his genuine signature. We are asked to examine these various signatures under a powerful glass and note the differences in them. We have read the evidence with care. We have examined the various signatures in evidence. All we can say is that the evidence is in conflict, and it therefore was a question of fact for the jury to determine whether the signature was genuine. Unless the judgment is against the weight of the evidence it is our duty to affirm it. Green vs. Mumper, 138 Ill., 434. It is not against the weight of the evidence and we are not judtified in setting the judgment aside on that ground.

Appellant contends that the court erred in not submitting to the jury the issue as to the liability of Bancroft upon the note and in staying the cause as to Bancroft. In support of this contention appellant cites Byers vs. First National Bank, 85 Ill., 423, which was decided under the Bankruptcy Act of 1867, in which it was held that it was error to stay the proceeding as to one of several defendants in an action ex contractu where a discharge in bankruptcy had not been granted prior to the entry of judgment for the reason that in this

[illegible] ...tures of Evans. On cross-examination he testified that in [illegible] copies on the signature to the note resembled the signature of Evans. [illegible] court overruled the motion to strike out this evidence and this [illegible] is assigned as error. We do not think either of these motions [illegible] improperly overruled. Both of the witnesses testified they were [illegible]iated with the handwriting of Evans. The mere fact that their [illegible] was not as positive as counsel for appellant might desire [illegible] ...ion a [illegible] the court could not strike it out without having committed [illegible].

[illegible]

[illegible] that can be said as to the evidence is that it was in con- [illegible] witnesses of prominence, called on each side, did not agree [illegible] whether the signature to the note was that of Evans. An expert [illegible] called by appellant was of great defect in pointing out [illegible] his genuine signature. We are asked to examine these various [illegible]ures under a powerful glass and note the differences in them. [illegible] read the evidence with care. We have examined the various [illegible]ures in evidence. All we can say is that the evidence is in [illegible], and it therefore was a question of fact for the jury to [illegible] whether the signature was genuine. Unless the judgment is against the weight of the evidence it is our duty to affirm it. [illegible] Harper, 138 Ill., 434. It is not against the weight of the ev[illegible] and we are not justified in setting the judgment aside on that grou[illegible]. Appellant contends that the court erred in not submitting to [illegible] the issue as to Bancroft. In support of this contention [illegible] plaintiff cites Byers vs. First National Bank, 88 Ill., 422. [illegible] under the Bankruptcy Act of 1867, in which it was held that [illegible] it was error to stay the proceeding as to one of several defendants [illegible] action on contracts where a discharge in bankruptcy had not been [illegible] prior to the entry of judgment for the reason that in this

state where several defendants are sued in an action ex contractu the recovery must be against all or none.

Section 11-A of the Bankruptcy Act of 1898, provides that a suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing against him, shall be stayed until after an adjudication, or the dismissal of the petition. If such person is adjudicated a bankrupt such action may be further stayed until twelve months after the date of such adjudication, or if within that time such person applies for a discharge then until the question of such discharge is determined.

Section 6 of the Negotiable Instrument Statute provides that persons severally liable upon promissory notes may all or any ofthem severally be included in the same suit at the option of the plaintiff, and judgment sedered in said suit shall be without prejudice to the rights of the xxx provides that all as between themselves. Section 88 of the same chapter deemed to be jointly and severally liable on a negotiable instrument are

Appellant cites various cases which he contends hold that the ruling of the court was in error. Upon examination it will be found that most of these cases are based upon contracts where there is a joint, and not a joint and several liability. If this suit had been upon a contract where the parties were jointly liable there might be some merit in the contention of appellant, but this rule does not apply to a note which is joint and several. In the first instance appellee could have sued Evans alone and if he proved his case he could have obtained judgment against Evans alone. He saw fit to sue both of the signers of the note. At any time prior to judgment he could have dismissed the suit as to either of the defendants and he would have been entitled to a judgment against the other one. The fact that the court stayed the suit as to Bancroft in no wise injured appellant. The court merely complied with the bankruptcy statute and Evans was not injured thereby.

We find no reversible error and the judgment is affirmed.

Judgment affirmed.

Section 11-A of the Bankruptcy Act of 1898, provides that a suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing against him, shall be stayed until after an adjudication, or the dismissal of the petition. If such person is adjudicated a bankrupt such suit may be further stayed until twelve months after the date of such adjudication, or if within that time such person applies for a discharge until the question of such discharge is determined.

Sect on 6 of the Negotiable Instrument Statute provides that persons severally liable upon promissory notes may all or any of them severally be sued in the same suit at the option of the plaintiff, and judgment against any said suit shall be without prejudice to the rights of the parties provides that all parties between themselves. Section 86 of the same chapter deemed to be jointly and severally liable on a negotiable instrument are

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the note. At any time prior to judgment he could be

suit as to either of the defendants and he would have been entitled

judgment against the other one. The fact that he sued the surety

as to Bancroft in no wise injured appellant. The court

with the bankruptcy statute and Evans was not injured by such

We find no reversible error and the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson

*Clerk of the Appellate Court.*

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:



Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

A. L. DeBoer,

Appellee,

vs.

Dennis J. Foley,

Appellant.

Appeal from the Circuit Court of Livingston County.

236 I.A. 649

Partlow, J.

The appellee, A. L. DeBoer, in the circuit court of Livingston county, obtained a judgment against appellant, D. J. Foley, for $275.00, as damages for trespass to real estate, and this appeal has been prosecuted.

The declaration consists of but one count and alleged the trespass. The general issue was filed and two special pleas alleged license. The replication consisted of a joinder of issue, a denial of license, and setting up the statute of frauds. A demurrer to the statute of frauds was overruled. A stipulation was entered into which was considered as a rejoinder to the replication which averred the special statute on drainage known as the statute of 1889, to which rejoinder issue was joined.

The appellee had a life estate in forty acres of land in Livingston county and had been in possession about forty-five years. The appellant owned one hundred acres of land immediately east of the land owned by appellee, The natural flow of the water upon the premises of appellant was to the west across the land owned by appellee, through a depression or swail, which had an outlet in an open ditch along the roadside on the west side of appellee's land. There was an open ditch along the roadside on the west side of appellee's land. There was an open ditch or swail through appellee's land and he had placed in the bottom of this swail across his land, a five inch tile which was about thirty inches below the surface of the ground. This tile had an outlet in an open ditch about twenty rods east of the west line of appellee's land. Appellee farmed over this swail and tile.

Appellant claims that during the spring of 1922, he had a talk with appellee relative to drainage, in which appellant told appellee

Appellee,

Appeal from the Circuit Court
of Livingston County.

Dennis J. Foley,
Appellant.

Partlow, J.

The appellee, L. [illegible], in the circuit court of Livingston county, obtained a judgment against appellant, D. J. Foley, for $[illegible], to recover possession of real estate, and this appeal has been [illegible].

The [illegible] consists of but one count and alleged the trespass. The general issue was filed and [illegible] to the [illegible] registration consisted of a joinder of issue, a denial of licence, and setting up the statute of frauds. A demurrer to the statute of frauds was overruled. A stipulation was entered into which was considered [illegible] rejoinder to the replication which averred the special [illegible].

[illegible]

The [illegible]

[illegible]

which was about thirty inches below [illegible] tile. The tile had an outlet in an open ditch about twenty rods [illegible] of appellee's land. Appellee farmed over this small [illegible] tile.

Appellant claims that during the spring of 1922, he had a tile

that this ditch should be cleaned out so it would carry the water, and appellee replied that it would be all right and that appellant was to clean it out at his own expense. About three weeks later appellant claims he had another conversation with appellee and it was then stated that the ditch should be put in over where the tile had been placed, to which suggestion appellee again said all right. Appellant also claims that appellee told him that if he got down to the tile to take them up and pile them away and that the ditch to be cleaned out should follow the line of the tile across appellee's land. In October, 1922, appellant went upon the premises of appellee and cleaned out the tile and put in a ditch. The ditch started at the road on the west side of appellee's land and went in an easterly direction across appellee's land to the line of appellant's land, and the open ditch through appellee's land was cleaned out. It is claimed by appellant that the ditch through the appellee's land made by appellant was about three feet wide at the bottom and twelve feet wide at the top, and about three feet deep. On the other hand, the evidence on behalf of appellee is that appellant dug a ditch through appellee's land which was nine or ten feet wide at the bottom, twelve to fourteen feet at the top, and that it went down into the clay; that the dirt was thrown out on each side at an average width of forty-nine feet. At the east end of the ditch the grade of the open ditch made by appellant went down to the level of the tile, and about seventy-five, five inch tile were taken out. During the season of 1922, appellee did not live upon this farm, and did not return to the farm until in December of that year. Upon his return he sent two letters to appellant stating his objection to the ditch. He received no reply from appellant, and at the October Term, 1923, began a suit for trespass and a judgment was rendered for $275.00 against appellant.

At the close of the appellants evidence the court sustained a motion to exclude all of the testimony relative to the conversations between appellant and appellee concerning the ditch. This motion was sustained upon the ground that the conversations were not sufficient

that this ditch should be cleaned out so it would carry the water, and appellee replied that it would be all right and that appellant was to clean it out at his own expense. About three weeks later appellant claims he had another conversation with appellee and it was then stated [illegible]

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[illegible] the line of the tile across appellee's land. In October, 1922, [illegible]llant went upon the [illegible]ses of appellee and cleaned out the tile and put in a ditch. The ditch started at the road on the west side of appellee's land and went in an easterly direction across appellee's land to the line of appellant's land, and the open ditch through [illegible] out. It is claimed by appellee that the ditch through the appellee's land made by appellant was about three [illegible] wide at the bottom and twelve feet wide at the top, and about [illegible] the evidence on behalf of appellee is that appellant dug a ditch through appellee's land which was nine or ten feet wide at the bottom, twelve to f[illegible] feet, [illegible] and the [illegible]

each side at an average width of forty-n[illegible] feet. At the east end of the ditch the grade of the open ditch made by appellant went down to [illegible]. During the season of 1922, appellee did not live upon this farm, and did not return to the farm until in December of that year. Upon [illegible] return he sent two letters to appellant stating his objection to [illegible] ditch. He received no reply from appellant and at the October [illegible], 1923 began a suit for trespass a[illegible]

[illegible]

[illegible]tion to exclude all of the testimony relative to the conversations [illegible]en appellant and appellee concerning the ditch. This motion was [illegible]tained upon the ground that the conversations were not sufficient

to show a license to appellant to go upon the land of appellee and construct the ditch in the manner in which it was constructed. The appellant contends that in this ruling the court was in error, and that he had a right to do what he did do in this case.

We do not think it is necessary to take up very much time in deciding the merits of this controversy, or in a discussion of the various legal propositions which are suggested by appellant. The substance of the conversations between appellant and appellee was that appellant should have the right to go upon appellee's land and clean out the ditch so there might be a natural flow of water across the land of appellant. The evidence shows that appellant did not limit himself to the authority granted by appellee. He went upon the land of appellee and dug an immense ditch through that land and threw the dirt out on each side for a distance of about fifty feet. The ditch as constructed was not on the line of the tile as agreed upon in the conversation but it took a different course. In constructing this ditch appellant was a trespasser and did so without authority of appellee. The evidence shows that it would take about $275.00 to remedy the damage occasioned by appellant. The judgment, therefore, is within the evidence, and appellant failed to show that he had authority from appellee to do what the evidence shows was done by him upon appellee's land.

For this reason the judgment will be affirmed.

Judgment affirmed.

show a license to appellant to go upon the land of appellee and construct the ditch in the manner in which it was constructed. Appellant contends that in this ruling the court was in error, that he had a right to do what he did do in this case.

We do not think it necessary to take up very much time discussing the merits of this controversy, or in a discussion of the various legal propositions which are suggested by appellant. The evidence of the conversation between appellant and appellee was that appellant should have the right to go upon appellee's land and cut out the ditch so there might be a natural flow of water across the land of appellant. The evidence shows that appellant did not limit himself to the authority granted by appellee. He went upon the land of appellee and dug an immense ditch through that land and threw the dirt out on each side for a distance of about fifty feet. The ditch as constructed was not on the line of the title as agreed upon in the conversation but it took a different course. In constructing the ditch appellant was a trespasser and did so without authority of appellee. The evidence shows that it would take about $275.00 to remove the damage occasioned by appellant. The judgment, therefore, is in accordance with the evidence, and appellant failed to show that he had authority from appellee to do what the evidence shows was done by him on appellee's land.

For this reason the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of March in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson
*Clerk of the Appellate Court.*

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:



Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On JAN 31 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The American Distilling Company,
a corporation,
Defendant in error,
vs.
Everett W. Wilson,
Plaintiff in error,

Error to the Circuit Court
of Peoria County

236 I.A. 650

Partlow, J.

Defendant in error, The American Distilling Company, a corporation, began an action of assumpsit against plaintiff in error in the circuit court of Peoria county. The declaration consisted of two counts and in substance alleged that on March 6, 1923, plaintiff in error executed to defendant in error his promissory note for $410,900, due January 1, 1928, with interest at 4%, payable annually on January 1, of each year. The plaintiff in error failed to pay the interest due January 1, 1924, and there was due defendant in error, as interest, $16,436.00. An affidavit attached to the declaration alleged that the note was made and delivered upon an accounting between the parties for money had and received by plaintiff in error from defendant in error. Plaintiff in error filed the general issue and four special pleas together with an affidavit of meritorious defense. Defendant in error moved to strike the first three pleas and the affidavit from the files which motion was allowed. Plaintiff in error then filed the general issue and five special pleas together with an affidavit of meritorious defense. The first three special pleas allege that the note was without consideration and was procured through fraud and misrepresentation, the fourth special plea was that there was no consideration, and the fifth was a plea of fraud and misrepresentation. The affidavit attached to the pleas set out the nature of the defense. On the same day the pleas were filed, defendant in error moved to strike the affidavit from the files upon the ground that it was

The American Distilling Company,
a corporation,
Defendant in error,
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Plaintiff in error,

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of Peoria County

236 I.A. 650

Partlow, J.

Defendant in error, The American Distilling Company, [illegible] tion, began an action of assumpsit against plaintiff in error in the circuit court of Peoria county. The declaration consisted of two counts and in [illegible] alleged that on March 6, 1928, [illegible] tiff in error executed to defendant in error his promissory note for $10,000, due January 1, 1928, with interest at 4%, payable annually on January [illegible], of each year. The plaintiff in error failed to pay the interest due January 1, 1924, and there was due defendant in error, as interest, $16,436.00. An affidavit attached to the declaration alleged that the note was made and delivered upon an accounting between the parties for money had and received by plaintiff in error from defendant in error. Plaintiff in error filed the general issue and four special pleas together with an affidavit of meritorious defense. Defendant in error moved to [illegible] the first three pleas and the affidavit from the files which motion was allowed. Plaintiff in error then filed the general issue and five special pleas together with an affidavit of meritorious defense. The first three special pleas allege that the note was without consideration and was procured through fraud and misrepresentation, the fourth special plea was that there was no consideration, and the fifth was a plea of fraud and misrepresentation. The affidavit attached to the pleas set out the nature of the defense. On the same day the pleas were filed, defendant in error moved to strike the affidavit from the files upon the ground that it was

insufficient which motion was allowed and the affidavit was stricken. Plaintiff in error immediately asked leave to file instanter an additional and amended affidavit which was then and there presented to the court. The court denied the motion and without evidence other than the affidavit attached to the declaration entered judgment for $16,436.00, and this appeal was prosecuted.

Several grounds of reversal are urged but it will be necessary to consider but one of them. The declaration was filed under Sec. 55, of the Practice Act and was under oath. This cast upon the plaintiff in error the duty, not only of filing proper pleas setting up his defense, but he also had to accompany his pleas with an affidavit stating that he verily believed he had a good defense to the suit upon the merits to the whole or a portion of defendant in error's claim, and specifying the nature of such defense. When the second set of pleas were filed there was no demurrer to any of them and no motion was made to strike any of them from the files. The motion was to strike the affidavit which accompanied them upon the ground that it was not sufficient. For this reason the sufficiency of the pleas is not before us. Hunter v. Troup, 226 Ill. App. 343. If the affidavit attached to the pleas was sufficient then it was improperly stricken and the judgment would have to be reversed. If the affidavit was not sufficient and was properly stricken, the pleas were of no effect unless a new and sufficient affidavit was filed. The question for determination therefore is whether the affidavit was sufficient; and if it was not sufficient whether the court properly refused to permit plaintiff in error to file another affidavit which was sufficient.

The affidavit attached to the pleas did not have to set up the evidence or the facts in detail. Firestone Tire Co. v. Ginsburg, 285 Ill. 132. It did have to state the kind and character of the defense together with such facts as constituted a defense under the pleas filed and these facts have to be stated with sufficient

insufficient which motion was allowed and the affidavit was stricken. Plaintiff in error immediately asked leave to file instanter an additional and amended affidavit which was then and there presented to the court. The court denied the motion and without evidence other than the affidavit attached to the declaration entered judgment for $16,486.00, and this appeal was prosecuted.

Several grounds of reversal are urged but it will be necessary to consider but one of them. The declaration was filed under Sec. 55, of the Practice Act and was under oath. This cast upon the plaintiff in error the duty, not only of filing proper pleas setting up his defense, but he also had to accompany his pleas with an affidavit stating that he verily believed he had a good defense to the suit upon the merits to the whole or a portion of defendant in error's claim, and specifying the nature of such defense. When the second set of pleas were filed there was no demurrer to any of them and no motion was made to strike any of them from the files. The motion was to strike the affidavit which accompanied them upon the ground that it was not sufficient. For this reason the sufficiency of the affidavit is the question. Chicago v. [illegible], 186 Ill. App. 342. If the affidavit attached to the pleas was sufficient then it was improperly stricken and the judgment would have to be reversed. If the affidavit was not sufficient and was properly stricken, the pleas were of no effect unless a new and sufficient affidavit was filed. The question for determination therefore is whether the affidavit was sufficient; and if it was not sufficient whether the court properly refused to permit plaintiff in error to file another affidavit which was sufficient.

The affidavit attached to the pleas did not have to set up the evidence or the facts in detail. Firestone Tire Co. v. Ginsburg, [illegible] Ill. 182. It did have to state the kind and character of the defense together with such facts as constituted a defense under the pleas filed and these facts have to be stated with sufficient

particularity as to appraise defendant in error of the nature of the defense. Harrison v. Rosehill Cemetery, 291 Ill. 416. In Matthiessen v. Duntley, 307 Ill. 36, the affidavit attached to the plea alleged that "there was no consideration for the execution of the note sued upon, and that the defendant was not at the time of the giving of said note indebted to the plaintiff upon any consideration whatever, and that the said promise of the defendant was a mere naked promise without any good and valuable consideration therefor." The trial court struck this affidavit from the files upon the ground that it was not sufficient, and the Supreme Court held that this was error. The affidavit was filed under a rule of the municipal court of Chicago, but the Supreme Court held that the affidavit required under Sec. 55 of the Practice Act was substantially the same as the affidavit required under the rule of the municipal court.

The affidavit which was stricken in this case went into detail in stating the facts which plaintiff in error relied upon to sustain his pleas of fraud, misrepresentation and want of consideration. It will not be necessary to set out this affidavit in haec verba. We think, however, it was in substantial compliance with Sec. 55 of the Practice Act and that the court was in error in striking it from the files and in rendering judgment. Even if the affidavit which was stricken was not sufficient, the affidavit which plaintiff in error tendered and asked to have filed instanter not only stated the facts with sufficient particularity as to appraise defendant in error of the nature of the defense, but it set out considerable of the evidence and far exceeded the requirements of Sec. 55. If the court was not satisfied with the first affidavit it should have permitted plaintiff in error to file the last one tendered. The amount involved was quite large and plaintiff in error had the right to present to a jury the issues raised by his pleas.

For the error indicated the judgment will be reversed and the cause remanded.

Reversed and Remanded.

particularity as to apprise defendant in error of the nature of the defense. Harrison v. Rosehill Cemetery, 291 Ill. 416. In Meethieesen v. Bantley, 207 Ill. 56, the affidavit attached to the plea alleged that "there was no consideration for the execution of the note sued upon, and that the defendant was not at the time of the giving of said note indebted to the plaintiff upon any consideration whatever, and that the said promise of the defendant was a mere naked promise without any good and valuable consideration therefor." The trial court struck this affidavit from the files upon the ground that it was not sufficient, and the Supreme Court held that this was error. The affidavit was filed under a rule of the municipal court of Chicago, but the Supreme Court held that the affidavit required under Sec. 55 of the Practice Act was substantially the same as the affidavit required under the rule of the municipal court.

The affidavit which was stricken in this case went into detail in stating the facts which plaintiff in error relied upon to sustain his plea of fraud, misrepresentation and [illegible] of consideration. It will not be necessary to set out this affidavit in haec verba. We think, however, it was in substantial compliance with Sec. 55 of the Practice Act and that the court was in error in striking it from the files and in rendering judgment. Even if the affidavit which was stricken was not sufficient, the affidavit which plaintiff in error tendered and asked to have filed thereafter not only stated the facts with sufficient particularity as to apprise defendant in error of the nature of the defense, but it set out considerable of the evidence and far exceeded the requirements of Sec. 55. If the court was not satisfied with the first affidavit it should have permitted plaintiff in error to file the last one tendered. The amount involved was quite large and plaintiff in error had the right to present to a jury the issues raised by his plea.

For the error indicated the judgment will be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of March in the year of our Lord one thousand nine hundred and twenty-five

Justus L. Johnson

*Clerk of the Appellate Court.*

Rehearing denied April 1, 1925
7452

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of October, in the year of our Lord one thousand nine hundred and twenty-four, within and for the Second District of the State of Illinois:

236 I.A. 650

Present--The Hon. THOMAS M. JETT, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

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BE IT REMEMBERED, that afterwards, to-wit: On JAN 31 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Verner Kall, Appellee,

vs

W. G. Block Company,

Appellant.

Appeal from the
Circuit Court of
Rock Island County.

236 I.A. 650

Partlow, J.

Appellee, Verner Kall, began an action of assumpsit in the circuit court of Rock Island county against appellant, W. G. Block Company, for wages alleged to be due. There was a trial by jury, a verdict for appellee for $1253.50, judgment was entered upon the verdict, and an appeal has been prosecuted to this court.

Appellant was engaged in the retail coal business. It had several offices, one of which was in Moline, Illinois and was in charge of H. B. Zeffrin, as manager. The head office was in Muscatine, Iowa. Appellee was employed by appellant as a yard foreman. His pay varied from $23.00 to $30.00 per week, and at one time he was paid $37.00 per week, but his average wage was about $30.00 per week. He testified that appellant owed him $1523.50 over and above the regular wages which had been paid him during the period of employment; that this was due by reason of a contract which appellant, through its manager, entered into. He testified that on May 1, 1919, he had a conversation with Zeffrin in which Zeffrin told appellee that if appellee would continue in the employment of appellant that appellant would pay him fifty cents per hour; that he would be paid during the year at the rate of $30.00 per week, and the difference between the $30.00 per week and the amount which he would receive at the rate of fifty cents per hour would be paid him at the end of each year. This conversation was denied by Zeffrin.

Appellee continued in the employment of appellant from May 1, 1919, until March 7, 1923, when he was discharged. Just after his discharge he wrote a letter to appellant at Muscatine, Iowa, and made a demand for $1523.50, being the difference between what he was paid and

Vernor Hall, Appellee,

vs

. . Kline,

Appellant.

Appeal from the
Circuit Court of
Rock Island County.

236 I.A. 650

Mr. J. J. Hall, for appellee.

Appellee, Vernor Hall, began an action of assumpsit in the circuit court of Rock Island county against appellant, . G. Block Company, for wages alleged to be due. There was a trial by jury, a verdict for appellee for $1253.50, judgment was entered upon the verdict, and an appeal has been prosecuted to this court.

Appellant was engaged in the retail coal business. It had several offices, one of which was in Moline, Illinois and was in charge of E. B. Zeffirin, as manager. The head office was in Muscatine, Iowa. Appellee was employed by appellant as a yard foreman. His pay varied from $23.00 to $30.00 per week, and at one time he was paid $37.00 per week, but his average wage was about $30.00 per week. He testified that appellant owed him $1253.50 over and above the regular wages which had been paid him during the period of employment; that this was due by reason of a contract which appellant, through its manager, entered into. He testified that on May 1, 1919, he had a conversation with Zeffirin in which Zeffirin told appellee that if appellee would continue in the employment of appellant that appellant would pay him fifty cents per hour; that he would be paid during the year at the rate of $30.00 per week, and the difference between the $30.00 per week and the amount which he would receive at the rate of fifty cents per hour would be paid him at the end of each year. This conversation was denied by Zeffirin.

Appellee continued in the employment of appellant from May 1, 1919, until March 7, 1923, when he was discharged. Just prior to his discharge he wrote a letter to appellant at Muscatine, Iowa, and made a

what he claimed he earned. Fred Block went to Moline and had a talk with appellee and Zeffrin. Block asked appellee what this letter meant and appellee said he had about $1500.00 coming for back wages. Zeffrin said appellee had only the fractional part of a week coming, amounting to about $10,00, and he denied that he ever had any conversation with appellee with reference to fifty cents per hour. Block told Zeffrin to give appellee a check in full. Zeffrin wrote a check for $10.80, and made out a receipt which was signed by Kall in the presence of Block, Zeffrin, and two other witnesses. The check was endorsed by appellee and cashed and contained the words: "labor to date in full."

The declaration consisted of the common counts. Appellant filed the general issue together with an affidavit of defense which alleged that appellee had been paid in full, and that there had been an accord and satisfaction.

The principal contention of appellant is that the receipt by appellee of the check, his cashing the same, and his signing the receipt constitute an accord and satisfaction and are a bar to this suit. Where there is a dispute as to the amount of a claim, and the claim is unliquidated, and a check is sent to the creditor in full payment of the claim, the acceptance of the check by the creditor is an acceptance of the condition upon which it was offered, and the balance of the claim, if any, is thereafter barred. The creditor has no alternative except to accept what is offered with the condition upon which it is offered, or to refuse it. If he accepts the offer the acceptance includes all conditions attached thereto notwithstanding any protest the creditor may make to the contrary. Ennis vs. Pullman Palace Car Co., 165 Ill., 161; Canton Coal Co. vs. Parlin, 215 Ill., 244; Janci vs. Carny, 287 Ill., 359. In Re: Estate of Cunningham, 311 Ill., 311.

The facts presented do not show an accord and satisfaction. The appellee claimed there was a balance due him covering several years. This was disputed by appellant. At the conference between Block, Zeffrin, and appellee, appellant refused to recognize the claim or to pay anything on it. It was undisputed there was $10.80 due for labor

[illegible]

[illegible] he claimed he earned. Fred Black went to Molino and had a talk [illegible] with appellee and Zeffirin. Black asked appellee what this letter [illegible] appellee said he had about $1800.00 coming for back wages [illegible] to about $10., and he denied that he ever had any conversation with appellee with reference to fifty cents per hour. Black [illegible] Zeffirin to give appellee a check in full. Zeffirin wrote a check for $10.80, and made out a receipt which was signed by Xell in the presence of Black, Zeffirin, and two other witnesses. The check was [illegible] in $10.80.

[illegible] been paid in full, and that there had been an accord [illegible]

[illegible] principal contention of appellant is that the receipt by [illegible] constitute an accord and satisfaction and are a bar to this suit. There [illegible] is a dispute as to the amount of a claim, and the claim is un[illegible] [illegible] is thereafter barred. The creditor has no alternative except [illegible] It he accepts the offer the acceptance includes all [illegible] attached thereto notwithstanding any protest the creditor [illegible] Smith vs. Milliken Helene Gas Co., 168 Ill., [illegible] Coal Co. vs. Patlak, 218 Ill., 444; Bendt v. Gerny, 287 Ill. [illegible]. In Re: Estate of Tunnelgham, 311 Ill., 311.

[illegible] facts presented do not show an accord and satisfaction. The [illegible] claimed there was a balance due him covering several years. [illegible] disputed by appellant. At the conference between Black, [illegible] and appellee, appellant refused to recognize the claim or to [illegible] It was undisputed there was $10.80 due for labor

on Monday, Tuesday, and a part of Wednesday, just before appellee was discharged. The check was drawn and the receipt given in payment of this undisputed claim. If any amount had been received on the disputed claim for back wages appellant might be in a position to insist that there was an accord and satisfaction, but under the facts presented there was no accord and satisfaction and appellee was not barred thereby.

Appellant contends that the verdict is not sustained by the evidence. It is the contention of appellant that the only inference that can be drawn from the evidence of appellee is that the contract if there was one was to be for one year only and not until March 7, 1923; that the amount due as stated in the bill of particulars for the first year was $502.50, and this is the most under any view of the evidence that appellee would be entitled to recover; that the evidence does not even sustain this contention, and that appellee received his pay every two weeks without protest and waited until after he had been discharged before he claimed his back pay, and for that reason the evidence does not show he is entitled to receive any amount.

The evidence shows that appellee was employed as a yard man. He had charge of eight horses, fed and watered them, Sundays, mornings, nights, and holidays. He cleaned the office and built the fires in the furnace. He went to work about five O'clock in the morning. The drivers cleaned out the stables in the morning but appellee cleaned them out on Sunday. He washed the floors in the office, wiped the furniture, and during a part of the time drove a team, hauled coal at extra hours early in the morning, and late at night. He worked as late as seven or eight o'clock and sometimes as late as nine o'clock at night. Appellee testified that on May 1, 1919, Zeffrin said he would pay him the extra fifty cents per hour; that immediately upon Zeffrin's making this statement appellee began keeping a record of the exact number of hours which he worked each day, which record was offered in evidence. On May 1, 1920, appellee turned in his time to Zeffrin and was paid an additional $250.00 which Zeffrin claimed was a bonus and which appellee

claimed was for his extra time. Appellee testified the $250.00 was not sufficient to cover the amount which he had earned, and that he had various conversations with Zeffrin relative thereto, and with reference to the additional amount which he was entitled to receive; that he talked with Zeffrin a year or more after the $250.00 was paid. He says he talked to him about two weeks before Christmas in 1921. He testified that shortly after the $250.00 was paid he had a talk with Zeffrin and said he was dissatisfied, and Zeffrin said he would raise his pay to $37.00 a week and would pay the balance at the end of the year; that nothing was said as to how long the arrangement would last; that he received $37.00 per week from that time until Christmas when he was reduced to $32.00 per week, and he was finally cut to $30.00 per week, and later got only $27.00 per week.

Block testified that all the yard foremen in the employ of appellant were hired by the week and not by the hour; that Zeffrin had no authority to hire appellee or anybody else by the hour; that he (Block) did not decide to pay this alleged bonus until in May, 1920. Zeffrin denied the conversation with appellee but said that on May 1, 1919, he had a talk with appellee in which he told him that if his services were faithful he would pay him a bonus at the end of the year 1920; that appellee would be paid for all holidays whether he worked or not; if he was out hauling coal on Sundays, or if he was out late at night on any other duty outside of taking care of the office and feeding the horses he would be paid extra; that there was nothing said about fifty cents per hour; that he agreed to pay appellee fifty cents per hour for overtime, and paid him $250.00 in June 1920. He admitted that appellee was dissatisfied with the $250.00 and that appellee showed Zeffrin his time book and said he had more coming, and that he did not remember of appellee talking about it later on. He also testified that in arriving at the amount which appellee was paid for the partial week he figured at the rate of $27.00 per week; that appellee was supposed to work ten hours per day outside of taking care of the barn and cleaning the office; that Zeffrin kept the record of the time Kall worked each day and week;

[illegible] was for his extra time. Appellee testified the $250.00 was [illegible] not to cover the amount which he had earned, and that [illegible] various conversations with Zeffirin relative thereto, and with [illegible] to the additional amount which he was entitled to receive; [illegible] talked with Zeffirin a year or more after the $250.00 was paid. [illegible] he talked to him about two weeks before Christmas in 1921. He [illegible] that shortly after the $250.00 was paid he had a talk with [illegible] and said he was dissatisfied, and Zeffirin said he would raise [illegible] to $27.00 a week and would pay the balance at the end of the [illegible] that nothing was said as to how long the arrangement would last; [illegible] received $27.00 per week from that time until Christmas when he [illegible] to $32.00 per week, and he was finally cut to $30.00 per [illegible] later got only $27.00 per week.

[illegible] testified that all the yard foremen in the employ of appel- [illegible] hired by the week and not by the hour; that Zeffirin had no [illegible] to hire appellee or anybody else by the hour; that he (Bloch) [illegible] decide to pay this alleged bonus until in May, 1920. Zeffirin [illegible] a conversation with appellee but said that on May 1, 1919, he [illegible] talk with appellee in which he told him that if his services were [illegible] he would pay him a bonus at the end of the year 1920; that [illegible] would be paid for all holidays whether he worked or not; if he [illegible] hauling coal on Sundays, or if he was out late at night on [illegible] duty outside of taking care of the office [illegible] feeding the [illegible] be paid extra; that there was nothing said about fifty cents [illegible] that he agreed to pay appellee fifty cents per hour for over- [illegible] and paid him $250.00 in June 1920. He admitted that appellee was [illegible] satisfied with the $250.00 and that appellee above Zeffirin his [illegible] said he had more coming, and that he did not remember of appellee [illegible] about it later on. He also testified that in arriving at the [illegible] which appellee was paid for the partial week he figured at the [illegible] of $27.00 per week; that appellee was supposed to work ten hours [illegible] day outside of taking care of the barn and cleaning the office; [illegible] Zeffirin kept the record of the time Xaff worked each day and week;

that in figuring the $10.80 which appellee was paid at the time of the settlement he figured Monday and Tuesday in full and a part of Wednesday at the rate of forty-five cents per hour.

From this evidence it is apparent that there was considerable dispute between the parties. The evidence on behalf of appellant is not in harmony. Block testified that he did not decide to give the bonus until 1920, while Zeffrin testified that he promised appellee the bonus in May, 1919. Block testified that Zeffrin had no authority to pay by the hour, and yet Zeffrin testifies that he agreed to pay Kall for extra work by the hour, and that the amount of the check of $10.80 was figured at the rate of forty-five cents per hour. It seems strange that appellee, if there was nothing said about fifty cents per hour, should keep an accurate time book as to the exact number of hours he worked from May 1, 1919, until his final discharge. It was a question for the jury to say which of these witnesses they would believe. It is not within our province to interfere with this judgment unless we can say that it is clearly against the weight of the evidence. We do not feel justified in reversing the judgment on the ground that it is contrary to the evidence.

Appellant contends that the fourth instruction on behalf of appellee assumed that appellee was to be paid at the rate of fifty cents per hour, that the contract was indeterminate, and that such a contract, if entered into, would be in conflict with the statute of frauds. The instruction is not capable of the interpretation placed upon it. It tells the jury if they believe from all the evidence that a contract of employment existed between the parties, and that plaintiff was to be paid at the rate of fifty cents per hour, and that such contract was indeterminate. There was no assumption either that the contract was indeterminate, or that the rate was fifty cents per hour. It told the jury that they must determine from the evidence that these facts existed. There was no error in this instruction.

The ninth, tenth, twenty-fifth, twenty-sixth and twenty-seventh instructions were on the law of accord and satisfaction. The first two instructions were given and the last three refused, and error is

[illegible] the figured Monday and Tuesday in full and a part of Wednesday at the rate of forty-five cents per hour.

From this evidence [illegible] between the parties. The evidence on behalf of appellant is not in harmony. Block testified that he did not decide to give the bonus until [illegible], while Zeffirin testified that he promised appellee the bonus in May, 1919. Block testified that Zeffirin had no authority to pay by the hour, but [illegible] he agreed to pay Hall for [illegible] work by the hour, and that the amount of the check of $10.80 was [illegible] the rate of forty-five cents per hour. It seems strange that appellee, [illegible] worked [illegible] from May 1, 1919, until his final discharge. It was a question for the jury as to [illegible] they would believe. It is not [illegible] we can say that [illegible] to do not [illegible] that [illegible] in Zeffirin [illegible] it is [illegible] necessary to the decision.

[illegible] instruction on behalf of [illegible] assumed that appellee was to be paid at the rate of fifty cents per hour, that the contract was indeterminate, and that such a contract, if entered into, would be in conflict with the statute of frauds. The instruction is not capable of the interpretation placed upon it. It [illegible] if they believe from all the evidence that a contract of employment existed between the parties, and that plaintiff [illegible] at the rate of fifty cents per hour, and that [illegible]. There was no assumption either that the contract [illegible] was fifty cents [illegible] that they must determine from the evidence [illegible]. There was no error in this instruction.

The ninth, tenth, twenty-fifth, twenty-sixth and two [illegible] tions were on the law of accord and satisfaction. [illegible] tions were given and the last three refused, and error is

assigned upon the three that were refused. The ninth and tenth fully covered the law of accord and satisfaction. Appellant was not entitled to have the law repeated in the other instructions. There was no error in refusing these three instructions.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of May in the year of our Lord one thousand nine hundred and twenty-five.

Justus L. Johnson
*Clerk of the Appellate Court.*

General No. 7698 Agenda No. 2

April Term, A. D. 1924

The People of the State of Illinois, Defendant in Error.

vs.

Ellen Barnes, Plaintiff in Error.

Error to the Circuit Court of McLean County.

SHURTLEFF, P. J.

This is a writ of error to the Circuit Court of McLean County.

Ellen Barnes, plaintiff in error, is the keeper of a hotel in the City of Bloomington. A bill was filed to enjoin the use of the premises under the Illinois Prohibition Law by the State's Attorney. A decree was entered in accordance with the prayer of the bill.

The evidence showed that Ellen Barnes sold whiskey to one L. J. Ford. She admitted she made beer. The Sheriff searched the premises under a warrant and found a complete still, fiftyeight bottles of beer, some of which was in the ice box, a jar of mash in the process of fermentation, several packages of malt and hops, a bottle containing alcohol, a jug of wine and three bottles of whiskey that were not marked by drug store labels showing their purchase for medical purposes, as required by law.

Plaintiff in error offered proofs tending to show that the whiskey was purchased upon prescription from a druggist, and



that the alchohol was in the hotel prior to the enactment of the Prohibition Law; that the beer was made by Sarah Ramsey, a friend, residing with plaintiff in error in the hotel, but as a witness for the People and plaintiff in error denied the sales. The still, plaintiff in error accounted for, as having been purchased by her husband prior to the passage of the Prohibition Act, and that plaintiff in error did not know it was in the hotel. Plaintiff in error's husband had been dead three years.

There was a conflict in the evidence but the court below saw and heard the witnesses testify and we see no ground for disturbing the decree of the chancellor on the findings of fact.

Section 21 of the Prohibition Act provides: "Any room, house, building, boat, vehicle, structure or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this act, or where any mash, still or other property designed for the illegal manufact-

ure of liquor is kept, and all intoxicating liquor, mash, still, or other property kept and used in maintaining the same, is hereby declared to be a common nuisance; a single unlawful sale or barter or a single act of manufacturing liquor unlawfully shall constitute a nuisance as herein defined."

Defendant in error's only contention argued in her brief to reverse this decree is that: "Under the provision of the Volstead Act, a single sale, without more, and with no evidence of the continuation or recurrance of law violation or of facts strongly indicating either sales or long continuing violations or such a recurrance of unlawful acts or sales as to colorably indicate that the criminal prosecutions and penalties provided



by other parts of the Act were inadequate to cope with the situation, does not constitute a nuisance or warrant an injunction," quoting U. S. v. Cohen, 268 Fed. 420, and cases therein cited.

Section 21 of chapter 43, Cahill's Rev. Stat. 1923, provides, that a single unlawful sale or barter, or a single act of manufacturing liquor unlawfully shall constitute a nuisance as defined in the Act. The same rule has been adhered to in the later Federal cases. **Singer v. U. S.** 288 Fed 695; **U. S. v. Reisenweber,** 288, Fed. 520; **Feigin v. U. S.** 279 Fed. 107; **Lewinsoln v. U. S.** 278 Fed. 421; **U. S. v. Eilert Brewing & Beverage Co.** 278 Fed. 659; **Grey v. U. S.** 276 Fed. 395; **Young v. U. S.** 272 Fed. 967; **Wiggins v. U. S.** 272 Fed. 41

We find no error in this record on the assignment of errors and brief and argument of plaintiff in error from which the decree of the Circuit Court of McLean County should be disturbed. The decree of the lower court is therefore affirmed.

Affirmed.

4/28 Rehearing denied Oct 7-1924



General No. 7714 Agenda No. 12

April Term, A. D. 1924

Bloomington & Normal Railway and Light Co., Appellee

vs.

A. E. DeMange, Appellant

Appeal from McLean

HEARD, J.

Appellee brought suit in assumpsit against appellant in the circuit court of McLean county and filed its declaration, which consisted of the common counts and an affidavit of claim. Appellant filed thereto pleas of the general issue and setoff and filed therewith his affidavit of merits. Appellee thereafter filed its motion for judgment in accordance with its affidavit attached to its declaration on the ground that defendant's affidavit of merits showed no defense, which motion was by the court allowed, and it was ordered that testimony be taken to ascertain the amount of plaintiff's damages but no testimony was heard. Judgment was rendered for plaintiff for $1,676.13 and costs from which judgment an appeal was taken to this court in which case an opinion reversing and remanding the case was filed January 17, 1923, which is found reported in 229 Ill. App. 108 reference to which case is made for the contents of the affidavit of claim, affidavit of merits and the written order given to appellant to appellee for the motor upon which this suit is brought.

After the case was reinstated in the circuit court Appellant amended his affidavit of merits increasing the amount claimed for damage to the rice crop from $700.00 to $1400.00, leaving the issues and claims of the parties in all other respects as they were upon the first trial.

The second trial of the case was commenced on Wednesday, September 19, 1923, and on that day the court stated that there were reasons



why the case could not proceed on the following day, excused the jury until Friday morning at which time the trial proceeded and resulted in a verdict for plaintiff for $1750.97 upon which verdict judgment was rendered from which judgment this appeal has been perfected.

Appellant in his brief says: "That a trial Judge, in the absence of a motion with cause shown or consent of parties, has no power to adjourn a trial for two nights and a day and a half and neither the practice act or common law of proceedure justifies the assumption of such

power." When the adjournment was taken the court stated that there were reasons why the case could not proceed the next day. Appellant made no objection and by his silence gave consent to the action of the court. To allow counsel to attempt to take advantages of a proceedure to which they had given a tacit consent is a practice which can not be tolerated. Appellant's criticism of the action of the court in this respect is entirely unjustifiable.

The written order of Appellant which is the basis of this suit is the same written order which is set out in B. & N. Ry. & L. Co. v. DeMange **Supra.** In construing this contract we there said: "When we apply the rules of construction above stated to this contract, we must hold that by the terms of the contract appellee agreed to ship the motor in question to Dudley, Missouri, within sixteen weeks from January 26, 1920, and that time was of the essence of the contract."

The motor was not received by Appellant at Dudley, Missouri, within the time specified in the contract and was not delivered until September 25, 1920. It is true that D. W. Snyder, the agent of Appellee, testified that "the motor was delivered the latter part of August to Mr. DeMange's plantation, it may not have been delivered until early in September." But it appears that this testimony is not based on his personal knowledge but as he says upon information received from Appellant, and the written evidence shows that the date given him by Appellant in different letters was September 25, 1920.



The declaration in the case consisted of the common counts and it is contended by Appellant that to warrant a recovery under the common counts alone Appellee must have completely performed his part of the contract and that he can not under the common counts prove an excuse for its non-performance. The rule is well settled in this State that to entitle a plaintiff to recover upon a contract under the common counts he must prove that he has fully and completely carried out the part of the contract on his part to be performed and that he can not prove a waiver or other excuse for the non-performance of the contract. If he has not fully carried out and performed his part of the contract but such complete performance had been waived or there is other excuse for non-performance, then the plaintiff must declare specially upon the contract and set up such excuse for non-performance in the declaration.

In the present case however, Appellant did not

seek to take advantage of this rule of pleading in the trial court, but filed his affidavit of merits in which he recognized the right of Appellee to be allowed the purchase price of the motor so that under the practice act plaintiff's claim was not a matter for adjudication but the only question was whether or not as against it Appellant should be allowed damages by way of recoupment. In this state of the record Appellant can not be heard to contend that no recovery could be had in this case under the common counts.

It is contended by Appellee that even if by the contract for the purchase of the motor Appellee was bound to deliver the motor sixteen weeks from January 26, 1920, Appellant can not claim damages because of delay in shipment for the reason that Appellant repeatedly thereafter urged shipment be made as soon as possible, and even demanded the shipment of the motor, when he knew it was useless for that seasons crop and calls particular attention to a letter written by Appellant on July 31, which states: "I suggest that you continue to urge shipment of the motor on the earliest possible date regardless of the question whether it will arrive in time to be of service to this season's crop."



Sec. 52, Chap. 121a, Rev. Stats. Ill. provides: "In the absence of express or implied agreement of the parties, acceptance of the buyer shall not discharge the seller from liability in damages or other legal remedy for the breach of any promise or warranty in the contract to sell or the sale. But, if after acceptance of the goods, the buyer failed to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor. Sec. 69 provides (1) Where there is a breach of warranty by the seller, the buyer may, at this election—

(a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price.

(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty.

(c) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty.

(d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof

which has been paid."

In 23 R. C. L. 1374 it is said: "The acceptance of the goods by the buyer after the time for delivery is a waiver of the sellers failure to deliver in the required time in so far as the sellers right to recover the price is concerned, though the buyer may still have the right to claim damages for the failure to make due delivery."

It is to be noted that the notice required by section 52 **supra** is not a notice as to the amount of damages claimed to have been sustained by the buyer, but is a notice of "the breach of any promise or warranty." In the present case the contract was for the delivery of the motor within a specified time and time was of the essence of



the contract. The contract was also for the delivery of the motor for a purpose specified in the contract. There is no question in the case but what Appellee not only had full knowledge of its own that it had breached the contract but its attention was called to the fact that it was not complying with its contract by various letters written by Appellee to Appellant calling its attention to the fact that it was not complying with its contract, and also calling Appellee's attention to the fact that Appellant suffered certain specific damages by reason of Appellee's failure to comply with its contract.

Construing the contract in question as we did in the former case, under the evidence in this case, we are of the opinion that notwithstanding Appellant accepted the motor in question at a later date than that fixed for its delivery by the contract, Appellant is entitled to recoup, as against the purchase price of said motor, such damages, if any, as he may have proven by a preponderance of the evidence in the case that he sustained as the direct proximate result of Appellee's failure to deliver the motor at the time fixed by the contract for its delivery.

It is contended by Appellant that the judgment is based on a verdict which is manifestly against the weight of the evidence in the case. Appellant's claim for damages was of two kinds, one for damages to a crop of rice for the irrigation of which by the terms of the contract the motor was purchased, and the other was for moneys expended by him for the expense of installing another motor on Appellee's well for use in irrigating the rice crop.

Appellant was only entitled to recoup such damages as he sustained as the direct and proximate result of Appellee's failure to comply with the contract. Whether or not Appellant sustained damage by reason of a par-

tial failure of his rice crop as the direct proximate result of such failure was a question of fact for the jury and they have found that he was not so damaged. We do not feel that under the evidence in this case we would be warranted in disturbing their finding.



The contradicted evidence in the case shows that it was necessary in the cultivation of a field of rice that water should be turned upon the field to a depth sufficient to cover any grass or weeds that had started in the entire field and that a failure to get water on in apt time results in damage or failure of the crop; that Appellee having failed to comply with its contract for the delivery of the motor it was necessary for Appellant to procure another motor for the purpose of irrigating the crop; that he did so and that in so doing he was put to an expense of $45.00 for hauling the motor and returning it, $9.00 for installing the borrowed motor, $3.28 travelling expenses of the men who installed it and that he paid $2.50 per day for 83 days, amounting to $185.00 for the use of the motor. These expenses amounted in the aggregate to $242.28 and under the undisputed evidence in the case Appellant was entitled to recoup the same as against the purchase price of the motor which purchase price was shown by the contract to be $1480.00. Appellee, therefore, was entitled to recover instead of $1715.97, the purchase price, $1480.00 less $242.28 which is $1237.72, together with $21.13 express charges paid by Appellee making a total of $1258.85, together with 5% interest thereon from Oct. 25, 1920, amounting to $183.49 making a total of $1442.34 the amount for which Appellee was entitled to judgment against Appellant. There is no basis in the record for the allowance of interest from an earlier date.

If Appellee shall enter its remittitur within fifteen days from the filing of this opiniion reducing the judgment to $1442.34 as of the date of September 29, 1923, the judgment as remitted will be affirmed, otherwise be reversed and remanded.

236 I.A. 651

General No. 7735 Agenda No. 27

April Term A. D. 1924

The People of the State of Illinois, Appellant
vs.
Cecil Day, Appellee

Appeal from the County Court of Ford County.

HEARD, J.

This is an appeal from a judgment of the County Court of Ford County, Illinois, ordering the return of an automobile which had been seized by the sheriff. The information which had been filed in the County Court in the nature of a libel states that on September 22, 1923, the sheriff, being an officer of the law, discovered Oren Day in the act of transporting intoxicating liquor in violation of the Illinois Prohibition Act, in a certain Chandler automobile; that the sheriff seized said intoxicating liquor, found in said automobile, and that the sheriff did also seize and take possession of the said automobile, and attempted to arrest Oren Day, the driver, then and there in charge of and driving the said automobile; that Oren Day, then and there escaped arrest and has not since been apprehended.

The information further stated that Cecil Day, the son of Oren Day, claimed to be the owner of the said automobile, and that Oren Day had no interest in said automobile, but that Cecil Day had given Oren Day permission to use and drive the said automobile at any time the said Oren Day might desire to use the said automobile.

The information also asked that a time be fixed for the hearing and that a summons for Cecil Day be issued for the purpose of having an order made to sell the automobile as provided by the Illinois Prohibition Act.

Appellee filed an answer to said information alleging that he was the owner of the automobile in question; that he does not know that there was any intoxicating liquor found and that he has demanded



said automobile, as the owner of the same, but that said sheriff has refused to deliver the same to him; that he denies that he had given permission to the said Oren Day to drive said automobile at such times that the said Oren Day might desire to use the same; that he denies the right of the said sheriff to hold the same against him under the Illinois Prohibition Act, and the answer prays that the court may by its order require the sheriff to deliver the same

to him as his property.

By agreement of the parties the case was set for hearing on October 15, 1923, on which date the States Attorney entered a motion to dismiss the information, and to set aside the rule to show cause asked for in said information for the reason that the information was premature.

A cross motion was entered by Appellee, asking the court to order the automobile returned to Appellee. The court allowed the motion to dismiss the information, ordered the same dismissed and ordered the sheriff to return the automobile to Appellee.

Section 32, Chap. 43, Smith-Hurd, Ill. Rev. Stats. 1923 provides: "When any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law, with or without a warrant. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this Act in any court having competent jurisdiction but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by the court having jurisdiction of the case and shall be conditioned



to return said property to the custody of said officer on the day of the trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed. Summons shall issue against the owner of such vehicle or conveyance and all persons holding liens against said property, if they can be found within the jurisdiction of the court; if not so found, service must be had by publication as provided in section 46 of this Act.

Unless good cause to the contrary is shown the court shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expense of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceedings

brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the county in which the violation occurred. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, once a week for two weeks and by hand bills posted in three public places near the place of seizure, giving notice to the owner or lien holder of said property to appear in court and show cause, if any they have, why said property shall not be sold. And if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into



the treasury of the county in which the violation occurred."

It is assigned for error by Appellant that, Oren Day not having been arrested and convicted, the filing of the information was premature and that therefore the court had no right to order the return of the automobile to Appellee.

The law does not provide that the filing of the information and issuance of the summons shall be after conviction, but both reason and a careful reading of the statute in question require that a contrary construction be placed upon it. The law provides for service by publication which it would not be likely to do if the accused was already in the custody of the law.

It is not every automobile in which liquor is transported which may be forfeited, sold and the proceeds turned into the County Treasury. It is only when good cause to the contrary is not shown that the court will order a sale. If good cause to the contrary is shown then the court will refuse to order a sale and if all parties claiming the automobile are before the court it will order it returned to the party entitled to the possession.

It is scarcely conceivable that a legislature would pass a law which would deprive an innocent owner of an automobile of his property indefinitely and perhaps entirely just because some person, who had used it without

the permission, knowledge, or consent of the owner, to transport intoxicating liquor had not been apprehended.

It is claimed by Appellant however that the owner could give a bond and thus obtain possession of his property. The bond required however is conditioned "to return said property to the custody of said officer on the day of the trial to abide the judgment of the court." If Appellant's construction of this statute be correct then the innocent owner would be deprived of his right of property as he could not sell or dispose of it without incurring a forfeiture of his bond but must retain the same, and if the offender was never apprehended he would be entirely deprived of such right of sale or disposition.



That it was not the intention that the commencement of the proceedings to subject the automobile to forfeiture and sale was to await the conviction of the offender is evident by the fact that the bond provided by such section is to "be approved by the court having jurisdiction of the case."

When Appellee filed his answer claiming the automobile both parties were before the court and Appellee by dismissing the information could no more deprive Appellee of his right to have his claim adjudicated than could a plaintiff in an action in assumpsit in which a set off had been filed, or a complainant in a chancery case in which a cross bill had been filed, by dismissing his suit deprive the defendant of the right to have his claim adjudicated.

When the States Attorney dismissed his information it was a virtual admission of Appellee's claim and Appellee then bring the only person before the court claiming the automobile, the court property ordered it returned to him.

The judgment of the county court is affirmed.

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abst.

General No. 7722. Agenda No. 17

April Term, A. D. 1924

Stanley Grubczak, Plaintiff in Error.

vs.

Jessie Smith, Executrix of the Last Will and Testament of Louis Smith, deceased, Defendant in Error.

Writ of Error to Vermilion.

NIEHAUS, J.

This suit was brought by the plaintiff in error, Stanley Grubszak, against the defendant in error Jessie Smith as Executrix of the Estate of Louis Smith deceased, in the circuit court of Vermilion county, to recover damages for personal injuries suffered in a collision of the automobile of the plaintiff in error with that of the deceased. The collision occurred on the Dixie Highway, near the village of Wellington, in Iroquois county on the evening of May 14, 1922. The allegation of negligence against the deceased, Louis Smith, is, that by his servant, he carelessly and improperly ran, managed, operated and drove his automobile; and thereby caused it to run into the automobile of the plaintiff in error; there is also a charge in the declaration, that the Smith automobile, was driven at an excessive and dangerous rate of speed, in view of the condition of the traffic, and the use of the way, at the place of the collision. The case was submitted to the jury for determination on the charges mentioned. The trial resulted in a verdict of the jury finding the issues in favor of the defendant, and judgment was rendered on the verdict. A writ of error is prosecuted to reverse the judgment.

It appears from the evidence, that the decedent, Louis Smith, was riding in a Packard Sedan, traveling south on the Dixie Highway; and the car was driven by Pearl Gordon, his driver; Smith was accompanied by Carles M. Crayton, an attorney residing in Danville. They were coming back from a visit to Chicago. The plaintiff in error was driving a Buick coupe, and had visited Danville on the day in question, and was returning to Chicago. He was accompanied by a companion, named Joe Golomowski. The plain-



tiff in error suffered severe injuries from the collision, and the injuries of the decedent were fatal. The question of who was to blame for the collision; whether the decedent was guilty of the negligence charged, or the plaintiff was guilty of contributory negligence, were controverted questions of fact

in the case. These questions could only be determined by passing on the credibility of the witnesses who testified, and were therefore questions peculiarly within the province of the jury to determine. The jury reached the conclusion, that the decedent's car was not negligently driven or operated; or that the plaintiff in error was himself guilty of contributory negligence. We cannot say, that reaching either one of these conclusions was not warranted by the evidence; nor that the verdict was contrary to the weight of the evidence in the case. Sorensen v. Chicago Railways Co. 217 Ill. App. 174; Shearer v. A. E. & C. R. Co. 200 Ill. App. 225.

The record does not disclose any error in the rulings of the court upon the admission or rejection of evidence; and there appears to be no error in the instructions given for the defendant in error. It is contended that the form of the verdict is erroneous; the verdict found the issues in favor of the defendant; it is insisted that there should have been a finding that the defendant was not guilty. There is no merit in this contention. The defendant in the case was the Executrix of the Estate of the decedent, and it was the decedent who was charged with having been guilty of the tort; and not the executrix of his estate; and the question involved was not only whether the decedent was guilty or not guilty, but also whether the defendant in error was liable or not liable as executrix of his estate. The form was not incorrect. But an error in the form of a verdict in this kind of a case is not regarded as reversible error: Illinois Central R. R. Co. v. Reardon 157 Ill. 372. For the reasons stated, the judgment is affirmed.

413 a

236 I.A. 652

General No. 7743. Agenda No. 32

April Term A. D. 1924

William P. Smith, Appellee.

vs.

Wabash Railway Company, Appellant.

Appeal from Morgan.

NIEHAUS, J.

In this case the appellee, William P. Smith sued the Wabash Railway Company, appellant, in the circuit court of Morgan county, to recover damages under the "Federal Employers Liability Act," for personal injuries suffered by him, while employed by the appellant, as section hand and track repairer. The declaration alleges, that the appellant Railway Company was engaged in interstate commerce, and in the transportation of interstate freight; and that at the time of the injury, namely, on the 15th of November, 1922, it was negligent in transporting a carload of coal over its tracks in a freight car, which was in a defective condition. The evidence tends to show, that the freight car in question was a Chicago & Alton coal car, which had been transferred to the appellant, for transportation purposes, and that there was a defect in the truck frame or arch bar, which apparently caused the truck frame to collapse, and derailed the car just before it reached the place where the appellee was walking along the side of the track, in the course of his employment; and that the collapsing of the truck frame caused the coil springs in the truck to be ejected therefrom, and to strike the appellee; thereby causing his injuries.

There was a trial by jury, which resulted in a verdict and judgment in favor of the appellee, for $10,000.00. This appeal is prosecuted from the judgment.

The main controverted question in the case, is whether the freight car in question, had been properly inspected by the appellant at the time of its transfer, for the purpose of ascertaining whether it was in fit condition for use in the transporta-



tion of the coal. The appellant contends that the inspection of the freight car was a proper one; and that the car was found by the inspector to be in fit condition for such use; and that therefore no liability attaches. Whether the inspection was properly made, was a question of fact for the jury. The evidence tends to show, that there had been a crack in the truck frame, prior to its collapse, and that this defect was not

discovered by the inspectors. It is a reasonable inference from the evidence, that the crack weakened the truck frame to such an extent that the great weight of the coal, together with the stress and strain of the transportation, broke down the frame and caused the accident. And the jury were warranted from the evidence in reaching the conclusion, that the defect in the truck frame would and could have been discovered, if a proper inspection of the car had been made. It is contended, that the trial court erred in admitting the testimony of the witness, Charles E. Owens. Owens testified, that he was familiar with the duties and the work of car inspection; and had considerable experience as car inspector for the appellant; that a crack in an arch bar, such as the one in question, ought to be seen by a reasonable inspection. Appellant contends, that "to allow the witness Owens to testify, that the crack ought to have been seen at a reasonable distance was allowing him not only to testify as to a matter that involved no particular science, skill or knowledge, in order to formulate the opinion given, but to state as his opinion on the very fact that the jury was to determine." It was competent for the witness Owens to testify from his experience as a car inspector, at what distance a crack in an arch bar like the one in question, could be seen in the ordinary course of inspection of the car; but the testimony that it could be seen by reasonable inspection involved his conclusion as to what was a reasonable inspection, and was therefore incompetent; but inasmuch as the testimony of the witness on that point, was merely a matter of opinion, it cannot be regarded as reversible; especially in view of the fact, that appellant's own witness Knecht, who made the inspection in question for appellant,



in testifying concerning the same matter, stated, that cracks in cast steel frames like the one in question, were not very difficult to ascertain; and on cross examination further stated: "I do not use a hammer to detect cracks on arch bars. You can see them. No it is not very hard to see. They generally open up if they crack. Well a crack in the casting, they open up from the point it cracks—shells out. It is easier to detect a break in a cast steel frame than a wrought iron one."

Complaint is also made, because the court admitted in evidence as an exhibit, a photograph picture of a Bettendorf truck, like the one in use in the car in question. This picture was in evidence however, merely to give the jury a clearer idea of the construction of the truck, and the relative positions of the different parts; the arch

bars, and the springs, in the trucks. There was no error in the admission of the exhibit for the purposes of illustrating these features of the case.

We find no error in the instructions given for the appellee; and the record does not disclose any improper conduct of counsel in the argument of the case. We do not regard the amount of damages fixed by the jury as excessive, considering the serious and permanent character of the appellee's injuries. There is no reversible error in the record, and the judgment is therefore affirmed.

Judgment affirmed.

General No. 7750. Agenda No. 35.

April Term, A. D. 1924

L. A. Whitworth, Appellee.

vs.

Luther Perrine, Appellant.

Appeal from county court Macoupin County.

NIEHAUS, J.

This action relates to a roadway located along the north line of, and a part of, the northwest quarter of the north west quarter of Section 25 in Brushy Mound township in Macoupin county. The 40 acre tract mentioned, is owned by the appellee, L. A. Whitworth; north of this tract, and adjoining it, is a 40 acre tract owned by Luther Perrine, the appellant, who also owns the 40 acre tract to the east, and adjoining the tract last mentioned. The two 40 acre tracts now owned by the appellant, together with the 40 acre tract now owned by the appellee, were formerly parts of one farm owned by the father of the appellant—George W. Perrine, who had his residence on the east 40 acre tract; and prior to his death had resided on this tract for over forty years. During the time that he occupied this farm, and while he owned all the 40 acre tracts mentioned, the shortest and most convenient way to reach the public highway located on the west of the farm, was by using a strip of ground referred to as a roadway; and it was used as a roadway for the purpose of getting from his residence and farm to and from the public highway referred to; and it was the roadway used by Perrine and his family; and by others who wanted to reach the Perrine residence, or a road on the east side. It is clear from the evidence, that the use of the roadway was at all times by permission of Perrine, the owner of the strip of land in question, and was at no time was adverse to his ownership or control of the strip on which the roadway is located. Perrine, the owner, died about six years preceding the trial of the cause. After Perrine's death, partition proceedings were instituted by his heirs at law, and the three 40 acre tracts were sold under decree

of the circuit court by the master in chancery; the title of deceased to the 40 acre tract on which the roadway was located passed to the appellee; and the title to the other two forties, the forty north of appellee's tract, and the forty to the east on which the homestead was located, passed to the appellant. This was in the year 1919. After the master's sale, the appellant took possession of the north and east 40 acre tracts, and used the

strip of ground upon which the roadway in question was located, in the sameway that he had done when his father was living; and as he had used it, as a member of his father's family, until the fall of 1922, when the appellee built a fence on the north line of this 40 acre tract; and also shut off the travel across the strip in question. The appellant tore down the fence, and when the appellee rebuilt it, he again tore it down. Thereupon the appellee commenced this suit against him for damages; before a justice of the peace. She recovered a judgment for $150.00 before the justice, from which an appeal was prosecuted to the county court, where a jury was waived, and a trial by the court resulted in a finding and judgment for $35.00 against the appellant. This appeal is prosecuted from the latter judgment.

There were no propositions of law submitted to the trial court; and therefore no questions of law are involved, for determination here; the only question to be decided is, whether the evidence is sufficient to sustain the finding and judgment of the trial court. C. I. & W. Ry. Co. v. People 205 Ill. 538; Grand pacific Hotel Co. v. Pinkerton 217 Ill. 61; Ryan v. Schutt 135 Ill. App. 61.

The appellant's claim with reference to his right to use the strip of ground in controversy as a roadway, appears in his testimony; he stated on the trial: "I do not claim that this is a public road, but it is a road for me individually. The public has no right to use the road. **** I claim that the roadway, that I have the right to use, will straddle the line as I think it ought to be **** The forties on either side of this passage way were owned by George W. Perrine. He was my father

Page 2

and died about six years ago. It was about four years ago, and at that time he owned both of these forties.*** My position is, that because, while I lived with my father, and afterwards, we always traveled this way, we now have the right to continue to do so. This strip of land was always used for this purpose. When my father owned the land, and I was living with him, I always had the right to drive anywhere on the farm that I pleased." It is apparent from the evidence, that neither the appellant, nor any one else, acquired any rights to the strip, or easement in the same, which was adverse or claimed to be adverse to the full and complete ownership of appellant's father; and the title of the strip in question at the time of the father's death, was in the same condition with regard to ownership as the rest of the 40 acre tract upon which it was located; and the appellant had not acquired any right to use this strip adverse to his

father's ownership at the time of his father's death; and it is not claimed, that he acquired any easement in the strip since his father's death. The father's title and ownership, and complete control of the strip, passed by the master's deed to the appellee. And the appellee having the same legal title, and complete ownership and control, of the controverted strip of ground, as appellant's father had, she also had the same legal right to stop the appellant in the use thereof; and to build and maintain the fence referred to. We find no error in the finding and judgment of the court; and the judgment is affirmed.

Judgment affirmed.

4133a

236 I.A. 652

General No. 7629 Agenda No. 52

April Term, A. D. 1924

The People of the State of Illinois, Defendant in Error

vs.

Charles Rice, Plaintiff in Error

Writ of Error to the Circuit Court of Vermilion County.

SHURTLEFF, P. J.

Plaintiff in error was indicted by the grand jury at the October Term, A. D. 1923, of the Circuit Court of Vermilion County for the illegal possession and keeping intoxicating liquor for sale, in violation of the Illinois Prohibition Act. There was a verdict of guilty, judgment of conviction and sentence and the record is brought to this court by writ of error for review.

The evidence at the trial was that plaintiff in error lived across the railroad tracks from the Wabash depot in Danville, in a building commonly called the Delmonico Hotel. He had four rooms in his private apartments. A raid was made by the police department and his apartment searched, and hidden inside a large Grandfather clock in the sitting room of his private apartments, were found thirteen bottles of intoxicating liquor. Another bottle, containing wine, was found on top of the side board in the bed room of his private apartments.

The raid on the apartments of plaintiff in error was made at ten o'clock the night of July 23, 1923. Plaintiff in error had



been in jail for five days, being released on bond the evening of July 30, between five and seven o'clock, according to the jailer who released him. On his release, plaintiff in error went to his apartments with a Paul Galaskis, who was released from jail at the same time. He had left for Westville before the officers made the raid. Plaintiff in error testified he knew nothing about the liquor or how it got in the clock, which he testified was his own personal property. The evidence did not disclose how long the liquor had been in the clock, except that it was packed in, each bottle being wrapped in paper, and that it was necessary to take a board off the back of the clock to get it inside and to get it out.

No question is raised in this case on the rulings of

the Court, as to the admission of evidence or the giving or refusing of instructions, and the only assignment of error argued by plaintiff in error is that the evidence was not sufficient to warrant a conviction, because the evidence was not of such a character as to exlude every reasonable doubt of the defendant's guilt.

Defendant in error contends that the plaintiff in error is precluded from raising the question as to sufficiency of the evidence to support the verdict upon the ground that the question was not raised in the court below and upon the authority of **Graham v. The People,** 115 Ill. 566 and **Call v. The People,** 201 Ill. 499.

In the case at bar, plaintiff in error, after the verdict of the jury, made an oral motion to set aside the verdict and for a new trial, without specifying in the motion the grounds of the motion. This motion was argued before the court and overruled,



to which ruling of the court plaintiff in error properly excepted.

There was a similar motion in arrest of judgment, made orally, without specifying any grounds therefor, heard and overruled by the court, to which ruling plaintiff in error excepted, all of which proceedings, as to both motions, were properly preserved by a bill of exceptions and made a part of the record. In **Graham v. The People, supra,** there was no motion for a new trial made and preserved by bill of exceptions, but the clerk entered in his transcript of the common law record copies of what purported to be a motion for a new trial, and the court held that it was not properly preserved in that manner, as a part of the record, but should have been incorporated in the bill of exceptions.

In **Call v. The People, supra,** the bill of exceptions recites:

"Thereupon the defendant, by his counsel, moved the court to set aside the verdict and grant to said defendant a new trial, and said defendant filed the following motion in writing for a new trial," but the bill of exceptions, as certified, did not contain the written motion, and in that case again it was sought to bring the written motion before the court as a part of the common law record, and the court held that the "written motion" had not been made a part of the record. Some language used by the court in **Call v. The People, supra,** viz:—

"Nothing appearing in the record as to the grounds on which the motion for new trial was based, the presumption is that the trial court properly overruled the same, and it not appearing that the sufficiency of the evidence to support the verdict and judgment was raised by motion for new trial, we are not at liberty to go into that question—" tends to support defendant in error's contention. The whole subject



was reviewed in **Yarber v. Chicago and Alton Ry. Co.** 235 Ill. 589, and the court held on page 601:

"The statute has, however, modified, to some extent, the common law practice in regard to the method of review by bill of exceptions. What is now section 77 of the Practice Act has been in force in its material parts, substantially as at present, since 1827. It directs the party moving for a new trial to file the points in writing, particularly specifying the grounds of his motion. We have held that this section is directory, and not mandatory. The party moving for a new trial may be required by the court or the opposite party to file the points in writing, specifying the grounds of his motion. If this is not required and the motion is submitted without any statement in writing of the grounds therefor and without objection, the requirement of such statement is waived. If certain points in writing particularly specifying the grounds of a motion for a new trial have been filed, the party will be deemed to have waived all causes for a new trial not set forth in his written grounds and in the appellate court will be confined to the reasons specified. On the other hand, if the motion has been submitted without specifying, in writing, the grounds therefor, the party may avail himself of any cause for a new trial which may appear in the record, whether it be the admission or rejection of evidence, the giving or refusal of instructions, the lack of sufficient evidence or any error occurring on the trial. **(Ottawa, Oswego and Fox River Valley Railroad Co. v. McMath,** 91 Ill. 104; **Consolidated Coal Co. v. Schaefer,** 135 id. 210; **Hintz v. Graupner,** 138 id. 158; **Brewer Brewing Co. v. Boddie,** 162 id. 346; **Bromley v. People,** 150 id. 297; **Chicago, Paducah and Memphis Railroad Co. v. Goff,** 158 id. 453; **Landt v. McCullough,**

206 id. 214; **Kehl v. Abram,** 210 id. 218.)"

And this rule apparently has been followed in **The People v. Moritz,** 238 Ill. 496; **The People v. Faulkner,** 248 id. 161; **The People v. Melnick,** 263 id. 31; **The People v. Cione,** 293 id. 334, and **Anderson v. Karstens,** 297 id. 79. In **The People v. Melnick supra,** the record was the same as the record in the case at bar, and the court held that the question of the sufficiency of the evidence to support the verdict was properly before the court. Defendant in error's contention that the sufficiency of the evidence to support the verdict is not before the court, cannot be sustained.

Upon an examination of the testimony in the record it appears that there is no dispute about the intoxicating liquor being found in the private apartments of plaintiff in error, and it was found under such conditions that it cannot be said that the jury were not justified in finding by their verdict that he knew all about it. Thirteen bottles were found packed away inside his clock, in his private apartments. Strangers are not in the habit of hiding away such contraband, in such quarters. Even more convincing was the finding of a bar bottle full of intoxicating liquor on top of the dresser or side board in the bed room of plaintiff in error in plain view, in which room plaintiff in error had been shaving and cleaning up but a short time before the raid. It has repeatedly been held that the verdict of a jury will not be disturbed unless it is manifestly against the weight of the evidence as to indicate that the verdict is based on passion and prejudice. **The People v. Nordine,** 201 Ill. App. 70; **The People v. Cronk,**



131 Ill. 56; **The People v. Aholtz,** 121 Ill. 560; Graham v. **The People,** 115 Ill. 566. The evidence warranted the jury in believing beyond a reasonable doubt, that the defendant was guilty.

In **The People v. Cronk, supra,** the court said: "Unless we are clearly satisfied that the verdict is, under the evidence submited to the jury, wrong, it must stand."

From reading the entire testimony submitted, this court is not satisfied that the verdict is wrong, and it follows that the judgment of the Circuit Court of Vermilion County should be and is affirmed.

Affirmed.

H134a



General No. 7721 Agenda No. 46

April Term, A. D. 1924

The People of the State of Illinois, Defendant in Error

vs.

Charles Rice, et al., Plaintiff in Error

Writ of Error to the Circuit Court of Vermilion County.

SHURTLEFF, P. J.

Plaintiff in error, Charles Rice, was indicted with other persons by the Grand Jury, at the January Term, 1923, of the Circuit Court of Vermilion County for violating the Illinois Prohibition Act. He was found guilty by a jury and judgment of conviction and sentence followed. This case is brought to this Court by a writ of error.

The evidence on the trial showed that on the night of January 30, 1923, the sheriff of Vermilion County and two of his deputies made a raid on a tenant house about a half mile east of Westville. The home was located about a quarter of a mile from the public road. A large quantity of intoxicating liquor, in jugs and bottles, a copper wash boiler, a large number of barrels, corks, burners, fusel paper, bottles of coloring, and other paraphernalia of similar character were found in the home and immediate vicinity. One Nic Rice was in the house at the time. He was arrested and brought to Danville and later Oscar Brown and the plaintiff in



error, Charles Rice, were arrested. Nic Rice pleaded guilty and served a jail sentence. Oscar Brown and plaintiff in error stood trial. A Mr. Sconce, who owned the raided premises, testified that he rented the premises to Nic Rice about sixty days before the raid by the sheriff, at the request of Oscar Brown, who stood good for and paid the rent. Oscar Brown did not testify at the trial. Plaintiff in error denied all connection with the premises, saying he had been there only once, going there on this one occasion to visit Nic Rice, when he heard he was sick.

Nic Rice, on the other hand, testified that plaintiff in error came to the shack in question at night and brought some bottles and jars and several packages. The jars were of twenty or twenty-five gallon capacity. He also brought a quantity of corks. About a week after plaintiff in error came back again and after he had been there, the witness Nic Rice saw a quantity of what he

called whiskey in one of the rooms. The witness bottled this liquor.

The witness Rice further testified that plaintiff in error told him to stay in the place and to keep a night watch on the place, and take care of the liquor. The substance of the testimony of the witness Nic Rice was that all he did was to guard the premises and bottle some of the liquor, and that everything else done in violation of the Illinois Prohibition Act was done by plaintiff in error, Charles Rice.

Error is assigned upon the Court's rulings in permitting the State's Attoney to put leading questions to the witness Nic Rice, and to cross examine him. We have read the testimony in the record in this case. The witness Nic Rice was an unwilling witness,



evasive in his answers, and his examination showed that he had made statements to the State's Attorney different from a portion of his testimony. It was not error to permit the examination as conducted in this case. **People v. Curran** 286 Ill. 311; **Cassen v. Galvin,** 158 Ill. 30 and **Bradshaw v. Combs,** 102 Ill. 428.

Plaintiff in error's chief contention to reverse this judgment is that a conviction based upon the uncorroborated evidence of an accomplice' where the accomplice is contradicted by the accused who is corroborated by other evidence, or a conviction based upon the unsupported evidence of a discredited witness, who is contradicted by the accused, can not stand as a matter of law, and various cases are cited to support that contention. Neither the cases cited or the contention made conform to the facts of the case at bar. Plaintiff was convicted in this case substantially upon the testimony of the witness Nic Rice, which was contradicted by the accused, but the testimony of the accused was in no manner corroborated and the testimony of Nic Rice was not in any particular discredited. The case does not, therefore, fall within the line of the cases cited by plaintiff in error.

Plaintiff in error, while on the witness stand, to some extent corroborates the testimony of the witness Nic Rice. He had known him for fifteen years and worked with him in the mines. He testified that he had visited Nic Rice once in November or December, 1923, at the house or "shack" where the raid was made; that he had heard that Nic Rice was sick and had "walked out" to

visit him. Nic Rice did not testify to any sick spells, and the testimony shows a friendly relationship existing between the witness and plaintiff in error, by the latter's testimony and the effort



made by the witness Rice to avoid testifying and shield plaintiff in eror. The evidence warranted the jury in believing beyond a reasonable doubt, that the defendant was guilty.

Where the evidence is in direct conflict, it is peculiarly the province of the jury and trial court to decide the issues. It is only where the verdict is so palpably and manifestly against the weight of the evidence as to indicate that the verdict is based on passion and prejudice, that a verdict and judgment therein will be set aside. **People v. Nordine,** 201 Ill. App. 70; **People v. Cronk,** 131 Ill. 56.

And a conviction based on the testimony of an accomplice will not be reversed on that ground alone, especially where there are any corroborating circumstances. **People v. Covitz,** 262 Ill. 514; **People v. Fox,** 269 Ill. 316.

The jury were properly instructed and it was peculiarly the function of the jury to determine what credit should be given to the testimony of the witness before them.

Finding no error in the record, the judgment of the Circuit Court of Vermilion is affirmed.

Affirmed.

236 I.A. 652

General No. 7736 Agenda No. 28

April Term, A. D. 1924

Pauline Adler, Appellee

vs.

Henry Meyer, Appellant

Appeal from the County Court of Macoupin County.

SHURTLEFF, P. J.

Appellant suffered a judgment to be entered against him by default in Justice Court, before one John F. Weiss, a Justice of the Peace of Macoupin County, on the 22d day of December, 1922, for forcible entry and detainer, to recover the possession of one hundred and fifty acres of land, upon which appellant and his wife, Mamie Meyer, were then residing, and damages in the sum of three hundred dollars and cost of suit.

It is claimed by appellant that his wife, on said December 22, 1922, went in the evening to the said Justice to ascertain the amount of bond appellant would be required to furnish to take an appeal from said Justice, and said Mamie Meyer later testified that she was informed by said Justice that a bond in the sum of three thousand dollars would be required. Appellant, not being able to secure a bond in the sum of three thousand dollars, and considering a bond in that amount unreasonable and oppressive, inasmuch as the County Court to which he desired to appeal convened on the second Monday in March following, took no further action in the matter until the 28th day of February, 1923, when a writ of restitution having been issued upon February 21, 1923,



appellant presented his petition to the County Judge of Macoupin County, praying that a writ of certiorari issue, directed to said Justice, commanding him to certify the proceedings in said cause to the County Court of Macoupin Co.

On March 2, 1923, the County Judge of Macoupin County ordered a writ to issue, upon appellant filing a bond in the sum of one thousand dollars, with sureties to be approved by the court. The appellant filed a sufficient bond on the 5th day of March. The appellee appeared at the March Term of the County Court and moved to quash the writ and dismiss the petition for certiorari and assigned various grounds, among which is the

following; that the petition did not show any grounds upon which the petition should be granted and writ issue; that appellant did not appear in Justice Court, but permitted judgment to be entered by default and was therefore not entitled to the writ, and that the petition did not show that appellant had any defense, meritorious or otherwise, to said cause of action.

There was a hearing in the County Court upon said motion to quash and testimony taken. The Justice testified that he advised Mamie Meyer, on the evening in question, that to appeal appellant would be required to give a bond in double the amount of the judgment, and that he did not demand a bond in the sum of three thousand dollars. In this regard the Justice and Mrs. Meyer contradict each other.

However, the petition failing to state any grounds of defense that appellant had to said cause of action, or that he was injured by said judgment, was entirely insufficient upon which to grant the writ. **Chicago Stamping Co. v. Danly,** 85 Ill. App. 322; **Murray v.**



**Murphy,** 16 Ill. 275, and the petition further showing on its face that the appellant made no appearance in the Justice Court to defend said action, and stating no reason or excuse for appellant's default, shows that appellant was negligent in the premises and voluntarily suffered a judgment by default to be entered against him, which was sufficient ground for quashing the writ and dismissing the petition. **Chicago Stamping Co. v. Danly, supra; Murray v. Murphy, supra; Horrell v. Horrell,** 52 Ill. App. 477.

The Court below quashed the writ and dismissed appellant's petition for a writ of certiorari and in this finding and judgment upon this record there was no error.

Judgment Affirmed.

General No. 7742 Agenda No. 31.

April Term, A. D. 1924

Walter Ayers, Appellee,

vs.

Jacksonville Railway Company, Appellant.

Appeal from the Circuit Court of Morgan County.

SHURTLEFF, P. J.

This is an appeal from a judgment of the Circuit Court of Morgan County entered on December 6, 1923, in favor of appellee and against appellant for twenty-five hundred dollars for damages alleged to have been suffered by appellee and his automobile in a collision with a street car of appellant on the night of August 13, 1921.

The case was tried upon appellee's amended declaration which contained seven counts. The first charged negligence that appellant's car on a down grade was running at a rapid and excessive rate of speed; the second, that appellant, by its motorman, carelessly and negligently failed to keep a proper look out while operating said street car down grade in the night time; the third, that appellant negligently operated the car, etc., without having the car properly equipped with a good and sufficient headlight; fourth, that appellant negligently ran its said street car, etc. down grade at an excessive rate of speed, etc. in the night time, without having said street car equipped with good and sufficient brakes to control the movements thereof; fifth, that appellant



negligently ran its said street car, etc. down grade at excessive speed, etc., without giving due and proper warning or signals of the approach of said car, etc.; sixth, that appellant suffered its said railway line to remain and be in bad and unsafe repair and condition and the space between the rails of said street railway depressed and the rails projecting above the surface of the way between the rails, etc. and the seventh count charged general negligence.

The testimony discloses that appellee, an elderly man, about sixty-eight years of age, with his wife, were driving towards their home in a seven passenger Cadillac automobile on the night of August 13, 1921, on West State Street, in the City of Jacksonville. Appellee and his wife had attended a chautauqua about a mile and three-quarters southeast of the Public Square at Nichols

Park. Appellee had driven the car for a period of five years and resided about three-quarters of a mile west of the Public Square, on the north side of West State Street.

It was shown that it was a very stormy night, the rain was falling in torrents and the water filled the gutters near to the top and extended over the pavement nearly to the center of the road. West State Street in Jacksonville is a paved street, ninety feet in width, the paving being forty-one feet from curb to curb; that the street car tracks, four feet and eight inches between the rails, were in the center of the paving and that from the north rail to the face of the curb was 18.3 feet. The top of the curb was seven inches above the surface of the gutter and from the gutter the pavement curved gradually to the center of the street, where it was substantially the same height as the



top of the curb.

It was further shown by the testimony that the rail of the street car tracks, near the place of the injury, extended above the pavement between the tracks, from one to one and one-half inches, as variously testified to by the witnesses.

Caldwell Street is about 1150 feet west of the scene of the injury and is 13.64 feet higher in grade, so that the car of appellant was running on a 1.17 per cent down grade when it collided with appellee's automobile.

Appellee left Nichols Park at about eight thirty in the evening, arrived at the Public Square and turned west upon West State Street, taking the center of the street straddling the north rail of the street car tracks. Appellee testified that the cars were parked on either side and all along the street; that he and his wife were not conversing; that he overtook a car ahead of him and followed it at a safe distance behind, fifty feet or more; that he was traveling less than ten miles an hour; that the thunder and lightning was incessant; that the car ahead preceded him on the same line in the street car track; that the car ahead of appellee got off the street car track going to the north or northwest; that appellee attempted to make the same turn, over the north rail of the street car track to the northwest; that there was no street car in sight and no sound of any gong or signal that appellee heard; that appellee had no curtains or chains upon his car; that the wind shield of his car was two plates of glass, one above the other, the lower sta-

tionary, the other pushed out, leaving a space of about four inches between the top and lower wind shield for appellee to see through to the street, so that there was an

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opening directly in front of his eyes. Appellee's car was equipped with two head lights, standard Cadillac, and they were burning as appellee attempted to drive his car across the north rail of the street car track. He was struck by the car of appellant's railway.

There is various conflicting testimony as to whether appellant's street car was equipped with a head light, lighted, at and immediately preceding the injury; as to whether the motorman sounded the gong or gave a signal, as to the approach of the street car, and there was various testimony as to the rate of speed at which the street car was running and within what distance the street car, running at a rate of ten and twelve miles per hour, could be stopped, appellee offering testimony tending to show that the car could be brought to a stop in thirty feet and some of appellant's witnesses testifying that the car could not be stopped in less than sixty feet.

Appellant's motorman saw the two cars approaching and saw their lights, when over two hundred feet away. We have not undertaken to set out all of the testimony but merely an outline to show the general nature of the situation surrounding appellee's injury. The proofs offered amply warrant the amount in damages found by the jury, if appellant is liable for the injury. Testimony was adduced by appellee tending to sustain each count in the declaration. Some of it is sharply conflicting and on some of the issues different minds might arrive at different conclusions from the testimony submitted, but the jury saw the witnesses and heard the testimony and it is not the province of the court, in this case,

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to disturb

the verdict on the facts, if no prejudicial errors of law have intervened.

Appellee, in making his opening statement to the jury, was permitted to read the first count in the declaration, over the objection of appellant, and this is assigned as error by appellant, citing **Bernier v Illinois Central Railway Co.** 296 Ill. 473. The purpose of an opening statement is to advise the jury concerning the questions of fact, to prepare their minds for the evidence to be heard, and to give them an idea of the nature of the act-

ion and defense. **People v. May,** 276 Ill. 337; **Paige v The Illinois Steel Co.** 233 Ill. 317. The rule in **Bernier v. The Illinois Central Railway Co.,** supra, is based upon the holding in **Elgin, A. & S. Traction Co. v Wilson,** 217 Ill. 56, in which case it is held:

"It is not, however, error of reversible character to send the pleadings to the jury, but counts in the declaration to which demurrers have been sustained, should not accompany the other pleadings."

It has been held, however, in the last cited case and in other cases that it is a practice not to be commended, but not reversible error, and we cannot hold in this case, from reading the record, that the jury were prejudiced by hearing the count in the declaration read. **Coyne v. Avery,** 189 Ill. 381; **Cooke v. The People,** 231 Ill. 15.

Appellant contends that the appellee, being upon the tracks of appellant and knowing the street, having lived upon it for many years, and because of the fact that other witnesses, having seen the street car three hundred feet away, from the sidewalk, that the appellee was plainly



guilty of contributory negligence. It has been held in many cases that where one in the exercise of reasonable judgment, in view of all the circumstances, apparently has time to cross the tracks of a railroad in safety, it is not negligence per se to drive across the car track in the middle of a block and the question of contributory negligence should be submitted to the jury. **Chicago Union Traction Co. v. Jacibson ,** 217 Ill. 407; **Chicago City Railway Co. v Otis,** 192 Ill. 519; **Baltimore and Ohio Southwestern Railway Co. v. Keck,** 185 Ill. 400.

Plaintiff had the right to rely upon the belief that no street car would approach without a head light, and had a right to assume, if he saw no head light that no street car was approaching. **Chicago City Railway Co. v. Fennimore,** 199 Ill. 17.

At places other than street crossings, a street railway company has a right of passage along its tracks superior to the right of one traveling in a vehicle, but the company must employ all reasonable means to avoid injuring persons rightfully using that portion of the street occupied by its tracks, subject to the rule that such persons must exercise ordinary care for their own safety. **Pienta v. Chicago City Ry. Co.** 284 Ill. 246.

The public has a right to the use of the streets in a

lawful and customary way, and a street car has no right to make such use of the streets as to prevent that use by the public, or to operate its cars at a rate of speed incompatible or inconsistent with such use. **Savage v. Chicago and Joliet Ry. Co.,** 238 Ill. 396; **North Chicago Electric Ry. Co. v. Peuser,** 190 Ill. 71; **N. C. St. Ry. Co. v Smadraff,** 189 Ill 157; **Sampsell v Rybcynski,** 229 Ill p. 77.

Under all the facts in this case, this Court cannot say, as a

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matter of law, that appellee was guilty of contributory negligence, and the issue having been submitted to the jury their verdict should not be disturbed.

Appellant offered in evidence certain photographs, taken in the night time, and the testimony of the superintendent of appellant company, that he had made measurements and observations, and knew that when the curtain back of the motorman in the street car in question was drawn clear around the ring provided for it, there reamined 6.6 square feet of glass in front of the car, through which the lights in the car were visible to one approaching in front of the car, and that when the curtain was drawn two-thirds of the way around there would be approximately ten square feet of glass in front of the car, through which the lights in the car would be visible to a person approaching in front of the car. This testimony, upon objection by appellee, was rejected. As to the photographs, it was not shown that they were taken under the same conditions of weather that existed on the night of the accident and were therefore incompetent. **C. & E. I. R. R. Co. v. Crosse,** 214 Ill. 609.

As to the testimony of the superintendent, he was asked: "Have you made any measurements from which you can give the number of square feet of glass, through which light can be seen shining from inside the car. when the curtain is drawn up two-thirds of the way around the motorman?" Other similiar questions were asked by appellant and, upon objection made by appellee, were sustained. And appellant offered to prove by measurements made at night by this witness, at various distances and under various conditions, how light could be seen from in front of the car in question. None

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of the conditions stated were identical or similar to the weather conditions of the night of August 13, 1921, and none of

the questions asked pertained to the construction of the car. Under the conditions stated, the question called for the opinion of the witness which could as well be determined by any member of the jury, and was one of the ultimate facts to be determined by the jury and the objections were properly sustained. **Chicago City Railway Co. v. Towitz,** 218 Ill. 30.

Appellant assigns error on the ground that appellee's first and third instructions do not confine the jury to acts of negligence charged in the declaration, but leaves it to the jury to determine of what act of negligence appellant was guilty, without any reference to the declartion. Plainly the objection does not apply to the first instruction. Both the first and third instructions for appellee merely state the law as to the use of the street, and the relative duties devolving upon appellant and appellee in such use, and state correct principles of law, and the objection made could only cover the last clause of the third instruction which states: "Whether or not defendant negligently violated its said duty, the jury are to determine from the preponderance of the evidence."

In view of the fact that in several of the instructions for appellant the jury were instructed that before appellee could recover in this case he must prove by a preponderance of the evidence that the appellant was guilty of some act of negligence with which it was charged in the case,we think it unnecessary to comment further upon this assignment of error.



Appellant further assigns error upon the giving of appellee's second instruction and states, that it directs attention to the several acts of negligence charged in the declaration, "but it does not confine the jury to those acts." The instruction states that the declaration contains seven counts and in terse language sets out the substance of each count, ending with the seventh count as follows: "And the seventh count charges that the defendant, by its servant in charge of the street car, carelessly and improperly operated and managed its said car." The instruction did not particularize as to the general negligence charged in the seventh count, and it was not required that it should. It stated specifically and concisely each charge in the declaration and that the charges set out were all the charges made, that is, the seven counts in the declaration. The instruction should not have stated more, and there was nothing contained

in the instruction to confuse the jury and it covered all the issues. The objection is without merit.

Appellant, as to the second instruction, further contends that there was no testimony submitted to cover the charges in some of the counts of the declaration, but we have carefully examined the record and passed upon that objection heretofore in this opinion adversely to the appellant.

Objection is made by appellant to some of the court's rulings in permitting appellee's counsel to make statements to the jury, in his argument, as to the incompetency of the motorman of appellant, but there was testimony in the record from which, as a matter of inference and argument, such statements were within the line of proper argument, on the trial of the case, and the Court did not



err in its ruling in that regard.

Finding no substantial error in this record that warrants a reversal of the judgment and verdict in the lower court, the judgment of the Circuit Court of Morgan County is affirmed.

Affirmed.

236 I.A. 653

General No. 7749 Agenda No. 34

April Term, A. D. 1924

Charles Wilson, Appellant

vs.

John Rentfrow, et al., Appellee

Appeal from the Circuit Court of Shelby County.

SHURTLEFF, P. J.

Appellant held four notes, with power of attorney to confess judgment, against John Rentfrow, Maggie Rentfrow and J. E. Vail, attached. The notes were entered in judgment and there was a petition presented to the Court by J. E. Vail, under oath, stating that he never signed either of the notes, and that the signature of " J. E. Vail" to each of said notes was fraudulent and a forgery. The judgment was opened and Appellee Vail given leave to plead. Pleas were filed, under oath, raising the issue of forgery of said notes, and there was a trial by jury and verdict and judgment in favor of Appellee Vail and appellant has brought the record to this court, by appeal, for review.

Appellant assigns error upon the court's refusal to give appellant's first and second refused instructions as to appellee's ratification of said notes, but the substance of said instructions was included in appellant's fifth instruction given, and the refusal of said instructions was not error.

Appellant further complains as to the form of appellee's instructions, covering the subject of ratification, containing the



clause, "with a full knowledge of the terms and provisions contained in said notes," and the number of said instructions. Appellee presented six instructions on the subject of ratification, two as to the law generally upon the subject and one specifically in connection with each of the four notes with the clause mentioned. There were four counts in the declaration, each one based, separately, upon one of the notes. The defense was forgery of the notes and appellant attempted to show a general verbal authority given by Appellee Vail to his son-in-law, John Rentfrow, to sign Vail's name to notes and ratification of the signature of appellee to one of the notes.

Appellant's fifth instruction given, upon ratification

contained the clause: "Having full knowledge of all the facts, admitted that such note or notes was his," etc. We apprehend, under the authorities cited: **Hefner v. Vandolah,** 62 Ill. 483; **Anderson v. Warne,** 71 Ill. 20; and **Yeomans v. Lane,** 101 Ill. App. 228, that it is not required that a person have full knowledge of all the facts or the provisions contained in the notes in order to ratify his signature thereto, but the appellant, having fallen into substantially the same error, upon this phase of the law as appellee, under the peculiar circumstances of this case, we do not regard the giving of these instructions, nor the number given ,as reversible error. Appellee was entitled to have given an instruction covering each note.

As to the note for fourteen hundred and fifty dollars, appellant offered to testify and show "that two hundred dollars of the consideration for the note was obtained by the witness for the



purpose of paying upon another note, which at that time was in the hands of an attorney in Shelbyville, and bore the true and genuine signature of Appellee Vail, and that such note in the hands of the attorney was given in payment of property purchased by Appellee Vail at a sale, "and that said sum of money was paid to the attorney in payment of said note." This testimony was objected to and the objection sustained.

Appellant cites authority insisting that when a party participates in the consideration of a note, he ratifies the act of another in attaching his name thereto, with a full knowledge of all the facts. Such testimony might be some evidence of ratification, but in this case appellant did not offer to show that Appellee Vail knew anything about the transaction, or that the payment made by appellant was other than as a volunteer, without appellee's knowledge. The testimony of John Rentfrow is that he never told Appellee Vail that he was signing Vail's name to notes, and that he never said a word to Vail about the fourteen hundred and ninety dollar note, and the testimony is that Vail never knew anything about this note until a few days before the judgment was entered. Appellee Vail could not be estopped or charged with participating in the proceeds of a note that he knew nothing about. The rejection of this testimony was not error.

It is the opinion of this Court that substantial justice has been done in this case. John Rentfrow testified

that his father-in-law, at one time, had told him he could use his name to renew some notes and when he needed to do so. He also testified that he had been convicted of forgery and sentenced "on



notes where "J. E. Vail's" name appeared. Appellant Wilson "had been convicted of violating the criminal law three or four years before the trial in Jasper County, on a charge of the confidence game and was sentenced to the penitentiary." Appellant and John Rentfrow had had business dealings together. The body of the notes was written by Appellant Wilson, and John Rentfrow in signing appellee's name to three of the notes, to which he testified he signed Vail's name, had taken great pains to carefully copy Vail's signature, and the fourth note, which Rentfrow testifies he saw appellee sign, by the testimony of numerous witnesses who were acquainted in a business way with appellee's signature, the jury were amply warranted in finding that appellee's signature thereon was forged.

There was no substantial testimony tending to establish a ratification of the notes. While there were some minor inaccuracies in the instruction, as pointed out, the testimony amply sustains the verdict, and the judgment is affirmed.

Affirmed.

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236 I.A. 653

General No. 7751. Agenda No. 56.

April Term, A. D. 1924

The People of the State of Illinois,
Defendant in Error,

vs.

Steve Stanich, Plaintiff in Error.

Error to the County Court of Christian County.

SHURTLEFF, P. J.

Plaintiff in error prosecutes this writ of error from a judgment of the County Court of Christian Co., finding plaintiff in error guilty of having intoxicating liquor in his possession, the same then and there being intoxicating liquor, intended for use in violating the Prohibition Act of the State of Illinois. The information was filed by the State's Attorney on the 25th day of August, A. D. 1923, and contained five counts. It is contended by plaintiff in error that the information is not properly verified, the concluding paragraph being as follows:

"Edward E. Dowell after being sworn on his oath, states that the within information against Steve Stanich is true as he is informed and believes.

E. E. Dowell.

Subscribed and sworn to before me this 25th day of August, 1923.

E. A. George, County Clerk."



A motion to quash the information and each count thereof was made. This motion was confessed by the State's Attorney as to the fourth count. The motion was allowed by the court as to the second count and refused as to the first, third and fifth counts, upon which counts a trial was had, and the jury found the defendant guilty upon the first count of the information, the substance of which has been above set forth. Motion for new trial was denied and also motion in arrest of judgment, following which the court ordered that the defendant be committed to the county jail of Christian County for the period of ninety days and fined the sum of two hundred dollars and costs.

Plaintiff in error contends that the judgment should be reversed on the ground that the information was not properly verified and that it did not charge plaintiff in error with a violation of the Prohibition Act of this State.

It is further contended by plaintiff in error that the evidence submitted to the jury is not sufficient to warrant the conviction of plaintiff in error.

In the record proper, as brought to this Court, apart from the bill of exceptions the transcript of the clerk shows the motion of plaintiff in error to quash the information, the Court's order overruling the motion and plaintiff in error's exception. This transcript further shows the order of court overruling plaintiff in error's motion for a new trial, and it shows, also, a motion in arrest of judgment, with the Court's order overruling said motion and plaintiff in error's exception to each of the orders mentioned.

The bill of exceptions proper, sealed by the Judge and made a part of the record, shows a motion for a new trial, with the



grounds of the motion specified by plaintiff in error; but there is no order or ruling by the Court upon such motion or any exception by plaintiff in error thereto, or any motion in arrest of judgment contained in the bill of exceptions, as presented by this record.

Defendant in error contends that inasmuch as the bill of exceptions does not contain the court's order upon the motion for a new trial with the exception thereto, and the motion in arrest of judgment, with the court's order thereon, and plaintiff in error's exception's thereto, there is nothing before this Court, on the writ of error, to consider; and defendant in error further contends that a motion to quash an indictment, not incorporated in the bill of exceptions, is no part of the record, citing **Hyler v. The People,** 156 Ill. 511, and **Gillespie v. The People,** 176 Ill. 238.

As to the motion for a new trial, it has long been the settled practice in this state that if a party desires to have finding of the trial court on the evidence and its refusal of a new trial considered by a court of review, he must, by bill of exceptions, show the motion for a new trial, its refusal by the Court, and exception to the ruling. It is not sufficient that the transcript of the record, as made by the clerk, shows such motion, its disposition and an exception. **The Freman's Insurance Co. v. Peck,** 126 Ill. 494; and cases there cited; **Call v. People,** 201 Ill. 499; **The People v. Moritz,** 238 Ill. 494; **The People v. Faulkner,** 248 Ill. 161; **The People v. Jennings,** 252 Ill.

552, and Vol. 4 Corpus Juris, 161.

The bill of exceptions in this case, containing no order or

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ruling of the court upon the motion for a new trial, plaintiff in error is deemed to have waived his rights under the motion, and only such errors can be considered on the writ as are raised upon the record proper.

Defendant in error contends that the bill of exceptions should show a motion in arrest of judgment in order to raise a question upon the record in this case. We do not so understand the law. When any extraneous matter or substantive fact, not shown on the face of the record, is incorporated in a motion in arrest of judgment, it can only be shown by a bill of exceptions, and **Hyler v. The People, supra** and **Gillespie v. The People, supra,** cited by plaintiff in error, extend the rule no further. In the latter case, bills of exception were stricken from the files, but the court did not hold that it precluded a consideration of any errors appearing on the face of the record, and we are not able to find that there is any authority for a general rule that a motion in arrest of judgment is necessary to raise the question of error upon the face of the record. Doubtless there are cases in which, otherwise, the error would be waived.

"The record proper in a suit at law consists of the process by which the defendant is brought into court, including the sheriff's return, the declaration, pleas, demurrer, if there is any; also any judgment upon demurrer, or other judgment, interlocutory or final." **VanCott v. Sprague,** 5 Ill. App. 101.

"In a criminal case, after the caption stating the time and place of holding the court, the record should consist of the indictment, properly endorsed, as found by the grand jury; the arraignment of the accused and his plea, the empaneling of the

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traverse jury, their verdict and the judgment of the court." **McKinney v. The People,** 2 Gilman, 552.

In Baker v The People, 105 Ill. 454, the Court held:

"It is objected by counsel for the People, that inasmuch as the record fails to show the plaintiff in error excepted to the ruling of the court in disposing of the motion to quash, the question of the sufficiency of the

indictment does not arise on the record, and hence whatever the fact may be with respect to its alleged insufficiency, we are not permitted to consider it. This is a misapprehension. The rule contended for only applies where the ruling of the court is based upon extrinsic matter, which does not, without being embodied in a bill of exceptions, constitute a part of the record. There is no more necessity for excepting to the ruling of the court upon a motion to quash an indictment, than there would be for excepting to the ruling of the court upon a demurrer to a plea or declaration, and it will not be pretended, we presume, there is any necessity, or even propriety, for an exception in that case. **Gallimore v. Dazey, et al,** 12 Ill. 143; **Safford et al v. Vail,** 22 id. 327."

And the same rule has been followed in **Baldwin v. McClelland** 152 Ill. 42; **Distilling and Cattle Feeding Co. v. The People,** 156 id. 485; **Hagen Paper Co. v. East St. Louis Pub. Co.** 269 id. 538; **The People v. Douglas, et al** 274 id. 222 and **Hamlin v. Reynolds**, 22 id. 207.

We conclude, therefore, that the sufficiency of the information, in the case at bar, as to the verification as well as to the substance of the matters charged, is properly before the court on the record made.

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The information filed by the State's Attorney, being verified upon information and belief only, was insufficient, under the authority of **The People v. Clark,** 280 Ill. 160 and **The People v. Shockley**, 311 Ill. 255 ,and the motion to quash the information made by plaintiff in error in the court below, should have been sustained and the information quashed.

This disposes of the case and it becomes unnecessary to give consideration to the further assignment of error.

For the error in overruling plaintiff in error's motion to quash the information ,the judgment of the County Court of Christian County is reversed.

Judgment Reversed.

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236 I.A. 653

General No. 7753 Agenda No. 37

April Term, A. D. 1924

Comet Automobile Company, a Corporation, et al., (Landers Brothers Company, Appellant)

vs.

Farmers State Bank & Trust Company et al (The Millikin Trust Company and R. W. Jones, Receivers, Appellees)

Appeal from the Circuit Court of Macon County.

SHURTLEFF, P. J.

This suit involves the merits of a claim presented by appellant to the Circuit Court of Macon County against the Receivers of the Comet Automobile Company. In September, 1922, the Comet Automobile Company presented its bill of complaint to said Court praying an injunction against the Framers State Bank and Trust Company of Decatur and other defendants and such proceedings were had in said cause, that on the 16th day of September, 1922, said court appointed The Millikin Trust Company, a corporation, and Robert W. Jones, receivers of the property and effects of the said Comet Automobile Company, and thereafter, by an order and decree of said court, entered upon November 2, 1922, the said receivers were directed to notify all creditors of the Comet Automobile Company to present their claims, within three months from the date of first publication of notice thereof, to said court for adjustment and settlement.

In pursuance of such proceedings the appellant, Landers

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Brothers Company, a corporation of the State of Ohio, presented its verified claim, based upon a promissory note executed and delivered by said Comet Automobile Company to appellant, under date of April .12, 1922, for the principal sum of five hundred dollars, with interest thereon at the rate of seven per cent per annum, said note to become due in ninety days from its date. Appellant presented a further claim, amounting to the sum of $15,264.65, for or on account of goods manufactured and sold by the appellant to the said Comet Automobile Compnay, a portion of which had never been delivered and invoices and statements were attached to

said claim to show the state of the account.

The Receivers filed objections to said claim and at the May Term, A. D. 1923, of said court, the claim was referred to the Master in Chancery, to take the testimony and proofs of the respective parties and report the same to the court, together with his conclusions of law and fact thereon.

The Master took the proofs and reported the same back to the Court, with his findings and conclusions of law and fact, and recommended that a claim be allowed for the amount of said note with interest thereon to the 16th day of September, 1922, amounting to the sum of $514.22, but that the balance of said claim be disallowed.

There were objections made to said report before the Master, which being overruled were made exceptions before the chancellor and upon a hearing had the chancellor overruled the exceptions and a decree was entered in accordance with the Master's report and appellant has brought the cause to this court by appeal.



Appellant assigns error on the disallowance of all of said claim, except the amount found due upon the note. The Comet Automobile Company was engaged in the sale, manufacture and assembling of all kinds of engines, motors, automobiles, motor trucks, vehicles and carriages at Decatur, Illinois, and the appellant company was a supply house, manufacturer and jobber at Toledo, Ohio, furnishing and selling equipment, machines and supplies used by the Comet Automobile Compnay in its business at Decatur.

On October 17, 1919, the Comet Automobile Company placed three separate orders for goods, and upon December 5, 1919, seven separate orders and on December 15, 1919, another order, all in writng, and signed by the Comet Automobile Company with the appellant company, which were received and accepted by appellant company. Each of these orders was for separate materials in considerable amounts, upon prices quoted verbally by appellant's agent, as stated in the order and, with little variation, the dates of delivery were fixed in the order as on the first day of each month during the year 1920, in equal amounts.

Appellant delivered the goods and merchandise, as purchased by the Comet Automobile Company, under the terms of these orders, up to and including substantially that portion of the goods to be delivered under the con-

tract on April 1, 1920, and all of the goods shipped by appellant were paid for by the Comet Automobile Company, except the amount represented by the note.

Outside of the claim for the amount of the note, appellant's claim is for alleged losses sustained by appellant because of an alleged refusal on the part of the Comet Automobile Company

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to accept the balance of said goods and merchandise, and is based upon an alleged cancellation of said orders by the purchasing Company.

The Master found that: "The acceptance of delivery of said goods and merchandise by said Comet Automobile Co., on the date so provided in the said orders therefor, was waived by the said claimant, and by mutual agreement and understanding of said parties. The delivery of said goods and merchandise was postponed and held in abeyance; * * * * and that the claimant has failed to prove a cancellation of the said orders or breach of contract on the part of said Comet Automobile Company on last said date or any subsequent date."

This report has been approved by the chancellor. We have examined the testimony and correspondence between the parties with much care. From the first letter written by appellant appearing in the correspondence under date of May 1, 1920, in which appellant states:

"Referring to yours of the 28th with reference to your orders A—6629, A—6630, A—6632 and A—6633, on which you asked us to hold up further shipments until notified by you, we have marked your orders according, and will await your further instructions regarding same," to the Comet Automobile Company, until the close of the correspondence under date of January 16, 1922, written by the Comet Automobile Company replying to appellant's letters of January 13, 1922, there is no refusal on the part of the purchasing company to accept the goods, or notice of cancellation by appellant of the orders.

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It is true that on November 26, 1921, and again on January 13, 1922, appellant wrote letters to the purchasing company, rather insistent that dates be set for the delivery of the goods, but up to January 16, 1922, no date of shipment or delivery had been agreed upon by the parties or consented to by the purchasing company, and appellant had made no peremptory demand that the

goods be shipped or delivered or the orders be cancelled. The difference in value of the goods between the price fixed in the orders and the value of the undelivered goods upon May 17, 1920, is the basis of the claim, outside of the note. Appellant offered one witness as to the value of these goods. On direct examination his entire testimony was directed to stating the values of the various items in May, 1920. On cross examination it was shown that his entire knowledge of these values was obtained from a memorandum which he had in his pocket which "was made up in the office," and that this memorandum showed dates of valuation in December, 1921, and the witness testified that he "presumed he gathered the material himself."

The testimony as to values on the part of appellant was not convincing and there was testimony on the part of appellees tending to show that while there had been a "slump" in values during 1920 and 1921, at the beginning of 1922 the market had returned to normal values and that the goods sold were higher in value than when the orders were taken. However, there was no evidence in the record showing the value of the goods at the time of or after a breach of the contract.



"The time of performance of a contract may be changed by the mutual agreement of the parties and may be postponed to a definite date or for an indefinite period." 6 R. C. L. 914, sec. 298, 299; **Watson v. White,** 152 Ill. 364; **Munson v. Bragdon,** 159 Ill. 61.

Where there has been an indefinite postponement of performance of a contract the measure of damages is fixed as of a date a reasonable time after demand for performance. **Summers v. Hibbard, Spencer, Bartlett & Co.** 153 Ill. 111; **Paris Flouring Co. v. Imperial Cotton Milling Co.** 181 Ill. App. 215; **Baringer v. Imperial Cotton Milling Co.** 164 Ill. App. 467; **Houston v. Wendnagel,** 135 Ill. App. 95; **Northwestern Iron and Metal Co. v. Hirsch,** 94 Ill. App. 579.

Inasmuch as appellant on the 13th day of January, 1922, was still corresponding with the Comet Automobile Co., and insisting upon a delivery of the goods, it must be held that there is no testimony in this record showing or tending to show that appellant suffered any damages about the goods not delivered or accepted.

Appellant assigns error that the interest on said

note was computed only to the 16th day of September, 1922, the date of the receivership, and insists that interest should be computed to the date of the allowance of the claim. So far as this record has been presented to this court, it is a contest between the claimant and the receivers only, the amount allowed or a percentage of it, to be paid out of the assets in the receivers hands and in cases of that nature it is not error to compute interest to the date of the receivership only. **Gillett v. Chicago Title and Trust Co.** 230 Ill. 416.

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Finding no error in the record, the decree of the circuit court of Macon County is affirmed.

Affirmed.

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236 I.A. 653

General No. 7706 Agenda No. 48

April Term, A. D. 1924

People of the State of Illinois, Defendant in Error

vs.

Catherine Brandymore by her father and next friend,

John Brandymore, Plaintiff in Error.

CROW, J.

Error to the County Court of Coles County.

Plaintiff in error was sentenced to the school for girls at Geneva in a proceeding instituted in the County Court of Coles County. The proceedings were not had at a term of the County Court, but were in fact, as shown by the whole record, had in vacation. The complaint upon which she was brought before the court purports to have been filed 'in the County Court, vacation term, A. D. 1923.' The petition filed is dated November 13; the order was entered as of the same date, and by it she was committed to the care of a probation officer of the court. Later, on November 30, another order was entered committing her to Geneva Training School for girls, upon which order a mittimus was issued and she was sent to Geneva. To reverse the order of committment this writ of error is prosecuted, numerous errors being assigned.

The second error challenges the validity of the record because the proceedings were had in vacation. The proceedings here were carried on against plaintiff in error by virtue of the statute requiring them to be prosecuted in the County or Circuit Court. By 'Court' it must have been intended an organized body vested with judicial power. Neither the Circuit nor County Court can be so easily convened and organized. Unless convened as directed by law they are without power to hear and determine any matter that must be presented to a Court. Not only by the recitals in the record do we know the proceeding was in vacation, but by the statute fixing the terms of court which are first Mondays in February



and August, no adjourning time being shown. Matters directed to be heard at a term of the County Court are not cognizable at a term of the Probate Court,

though the County Court may then be sitting for the dispatch of probate business.

It follows, therefore, the judgment of condemnation of plaintiff in error to Geneva was void and for that reason alone must be reversed. It may be suggested that in counties having no distinct County Court, if delinquency cases are likely to be presented, the want of jurisdiction may be avoided and the facility for prosecuting such cases preserved by adjournment of the County Court from week to week or for such times as may be deemed best.

Another sufficient reason for reversing the order in the record now before us is found in the fact that all parties required in proceedings of this character have not been made parties. The plaintiff in error's mother was not made a party. The parents seem to have been divorced, but the mother was a party as essential to the proceeding as were the child or father. It does not clearly appear the father was made a party though the record shows he was present at the time of the adjudication and as next friend prosecutes this writ of error. A humane purpose seems to pervade this statute by having unfortunate children of tender years surrounded by parents or guardian present at the ordeal of the trial, or at least give them the opportunity to be present by service in a specific manner. Such parties are not in this record by entry of appearance nor by summons. They are essential to a valid judgment against the alleged delinquent, as we held in People v. McDonald, 225 Ill. App. 447.

The question is asked in brief of counsel for plaintiff in error, 'Are these delinquent cases probate matters so they may be had at any time?' To this pertinent query we are bound to give a negative answer. They bear no semblance to matters of probate jurisdiction, except in the



power to appoint a guardian. This power is a mere incident to the delinquency statute. The Circuit Court is given concurrent power with the County Court in such matters. The rules governing one govern the other. But no one could suppose there is anything of probate jurisdiction exercised by the Circuit Court because it can appoint a guardian for an alleged delinquent. The apparent difficulties are all met, it seems to

us, when it is remembered that the proceedings are special and statutory to enforce a special legislative purpose; an attempt, so far as human agencies can, to save delinquent children.

The judgment of the court below must be reversed. Inasmuch as the court has no jurisdiction and can acquire none by remandment, the cause will not be remanded but plaintiff in error will be discharged.

Reversed.

414a

236 I.A. 654

General No. 7720 Agenda No. 51

April Term, A. D. 1924

The People of the State of Illinois, Defendant in Error

vs.

Charles Rice, Plaintiff in Error

Error to Circuit Court of Vermilion County.

CROW, J.

Plaintiff in error was tried in the Circuit Court of Vermilion County upon an indictment charging him with being the keeper of a gaming house, after having been previously convicted of a similar offense in said county. He was found guilty and after motion for new trial and in arrest of judgment were overruled, was sentenced to pay a fine of $1000.00 and to imprisonment in the common jail of said county for a period of six months. To reverse this judgment a writ of error was sued out of this court.

The evidence shows that plaintiff in error was, on several occasions, at Tourist Inn, a common gaming house near Danville at the intersection of two public roads. On these occasions he dealt faro, a game played with cards in a box, as the record shows. Several witnesses testified to seeing him behind the 'lay-out', dealing the cards out of the box. They also testified they saw him selling checks used in playing the game. It is also testified that he acted as look-out in games. The look-out is one (as shown by the evidence) who watches the betting and calls the **dealers** attention to any bets he may overlook. All the functions shown to have been performed seem essential to the operation of the faro game.

He not only conducted the faro game, but on several occasions 'ran' a craps game. While this expression is a conclusion of the witnesses who do not seem hostile to Rice, the facts they detail amply support the conclusion.



In craps games it was Rice's duty to pay off the players if they won.

With regard to Rice's participation in the games, several witnesses say they never saw him conducting the games though they had seen him around the games.

But unless the times to which they refer are the same as those spoken of by witnesses testifying against him, their evidence has no value in determining guilt or innocence. Of course he denies all evidence he believes would incriminate him, or endeavors to explain it away.

The outline of facts, in the light of the law applicable to them authorized the jury to find him guilty. The Court saw the witnesses and was in better position to judge of their credibility than we. We are not justified in reversing unless we can say upon reading all the evidence we feel satisfied the evidence does not establish guilt beyond a reasonable doubt. This we cannot say.

As to the law involved, counsel for plaintiff in error has inadvertently misquoted the description, if not the definition of a keeper of a common gaming house, laid down in Stevens vs. People, 67 Ill. 587. The law of that case is incorporated in the second instruction given at request of the prosecution. Quoting the substance of the case referred to counsel say: "Before a person can be convicted of being the keeper of a common gaming house it must appear from the evidence that he is the proprietor or lessee thereof, or directly interested in the profits of the business; or that he had general superintendence or charge of the place." In the **Stevens Case**, so far were the court from holding as quoted, they held specifically as applied to the facts of that case, that if the defendant had general superintendence and charge, though but as an employee of the gaming house in question and of the gaming there carried on, he might be regarded as the keeper of the house, or, at least, that he so



efficiently aided and abetted in the offense of keeping the house that he might be rightly convicted of such offense. In that case it was stipulated defendant was not the owner or proprietor of the house in question, nor interested in the profits of the same, as profits; but at the time of his arrest was only employed in dealing cards (faro). No issue was presented in that case calling for the rule contended for. And defendant was convicted as keeper, though doing only one of the acts proved against Rice-dealing faro. People vs. Brown, 142 App. 610 decided by this court is cited, but does not support the contention of plaintiff in error. It has been generally held that control and management of the place, table or other

device, in whole or in part during some part of the time covered by the indictment, is sufficient to warrant a conviction. (27 Corpus Juris, 1011 sections 168 and 181, and cases cited.)

The Court did not err in its ruling on the admission of evidence; nor in the instructions given to the jury. There being no error in this record the judgment is affirmed.

Affirmed.

General No. 7704. Agenda No. 47.

April Term, A. D. 1924

The Board of Education of the State of Illinois, a corporation, Plaintiff in Error.

vs.

Frank Fitzsimmons, doing business under the name and Style of Fitzsimmons Construction Company. Defendant in Error.

Writ of Error to Sangamon.

NIEHAUS, J.

In this case, Frank Fitzsimmons, doing business under the name and style of Fitzsimmons Construction Compny, and defendant in error herein, sued William W. H. Miller as Chairman, Francis G. Blair as Secretary, Frank E. Richey, Henry H. Neal, Elmer T. Walker, Frank B. Stitt, William Bowen, Rolland Bridges, Charles L. Capen, and John C. Allen, members constituting the Normal School Board of Trustees, exercising the rights, powers and duties of the Board of Education of the State of Illinois, in the circuit court of Sangamon county, to recover damages for an alleged breach of a contract entered into in writing between the defendant in error and the Board of Education of the State of Illinois. There was a trial by jury of the issues involved in the controversy, and a verdict awarding the defendant in error damages in the sum of $30,000.00. Judgment was rendered upon the verdict against the Board of Education of the State of Illinois, the plaintiff in error herein, for that sum. An appeal was prosecuted by the parties defendant in the suit, to the Supreme Court; and the appeal was transferred to this court. Fitzsimmons v. Miller 308 Ill. 85. This court on consideration of the case, dismissed the appeal. Frank Fitzsimmons, appellee, v W. H. H. Miller, et al, appellants. (Gen. No. 7619.) The same case is now before us on writ of error prosecuted by the Board of Education of the State of Illinois.

All matters pertinent to a determination of the vital question now involved, namely, the validity of the judgment,



which was rendered, were passed upon and determined by the Supreme Court, and by this court res-

pectively, in the decisions referred to.

The records discloses, that the defendant in error did not make the Board of Education of the State of Illinois, which is a private corporation, existing under the laws of this state, a party defendant in his suit; and that no process was issued, or served, upon the Board of Education as required by the Statute to give the court jurisdiction of the person of the plaintiff in error, for the purpose of adjudicating the matters in controversy. This court expressly held in the previous opinion, concerning the validity of the judgment rendered, that "This judgment was therefore rendered against a private corporation, which had not been served with process of summons, and which had not in any manner appeared in court." It is apparent therefore, in this state of the record, that the trial court was without jurisdiction to try the suit, and to render the judgment against the plaintiff in error. The plaintiff in error has never had its day in court. The judgment is therefore reversed.

Reversed.

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236 I.A. 654

General No. 7730. Agenda No. 53.

April Term, A. D. 1924

Percy Lawson, Appellee.

vs.

Sherman E. Bigler, Appellant.

Appeal from City Court of Mattoon.

NIEHAUS, J.

In this case, the appellee Percy Lawson commenced suit in the city court of the City of Mattoon against the appellant Dr. Sherman E. Bigler, to recover damages, for personal injuries suffered by the appellee on account of alleged malpractice by the appellant. It is alleged in the declaration, that on or about the 28th day of November, 1921, the appellee suffered a fracture of the left leg; and that he went to the appellant to have the injury treated; but that the appellant did not properly treat his injury; and did not give it the necessary and diligent attention which the injury required; that he treated the fracture as a dislocation; and that by reason of such improper treatment, the fracture failed to heal; that the bones did not knit together as they could and would have done under proper treatment; and that they finally became diseased in consequence thereof, which necessitated an amputation of the left leg above the knee. The trial of the case, resulted in a verdict and judgment of $4000.00, from which judgment this appeal is prosecuted.

Several grounds are urged by the appellant for reversal of the judgment. It is contended that the rulings of the court on the admission of portions of the testimony of some of the witnesses was erroneous; especially with regard to the hypothetical question propounded to the physicians, who were called as experts; and it is pointed out in this connection, and insisted, that a hypothetical question must, (and appellees did not) embody in the questions, substantially all



material undisputed facts relative to the subject upon which the opinion of the witness was asked. This undoubtedly is the rule, where all the material facts are undisputed; but in this case many of the material facts were disputed, and therefore a different rule applies. "If the facts are disputed the party

find the issues in his favor."

Concerning this instruction, the Supreme Court, in Norton v. Clark, 253 Ill. 557 make the following comment: "The 13th instruction given at the request of the complainant, told the jury, that if the evidence upon the question of mental capacity or undue influence preponderates in favor of the complainant, although but slightly, it would be sufficient for the jury to find in her favor. That kind of instruction was introduced into the practice in Taylor v Felsing 164 Ill. 331, which was an action on the case, where the court could not say, that it was error to give it, and since the decision in that case it has become very common. It belongs to the same class, as instructions which assume that the evidence may be evenly balanced, and that there may be nothing which inclines the mind to one side or the other, and both are the natural product of our system, created and enforced by statute, for advising the jury as to the law, under which instructions are not formulated in the judicial mind, but are written by attorneys and advocates, whose every effort is to state the law as strongly as possible in behalf of their clients. In ordinary cases, where a mere preponderance of the evidence is sufficient, it cannot be said that it is error to give such an instruction." In view of this holding of the Supreme Court, we conclude, that the giving of the instruction referred to in this case was not reversible error.

Concerning the instruction in relation to the



measure of damages, designated as "the fourth, and first modified instruction," the principal contention of the appellant, is that it assumes facts not proven. We cannot agree with this contention; nor do we regard the instruction as subject to the other criticisms made in relation thereto. The instruction merely purports to give the jury the elements which they may consider in fixing damages, if they found from the evidence, that the appellee was entitled to a recovery. There is no reason to believe, that the jury have been mislead into thinking, that the injury referred to in the instruction, was the original injury, which the appellee had suffered; the injury referred to, is the one resulting from the alleged malpractice. If appellee's condition of ill health, and his pain and suffering, was prolonged or aggravated by the alleged malpractice, and finally necessitated an amputation of his left leg,

these matters, if proven, were proper to be considered by the jury, in estimating appellee's damages. Barnes v. Means 82 Ill, 379; Holtzman v. Hay 118 Ill. 534.

Error is also assigned on the action of the court in allowing the declaration to go to the jury upon retiring to consider their verdict. This practice has been repeatedly condemned; but reversible error does not necessarily result therefrom. The only harm which could result in a case of this kind, would be, that the jury might consider the declaration as a part of the evidence. But in this case, they were expressly instructed by the court "that the declaration is merely a statement of what the plaintiff alleges; and that it neither proves nor tends to prove allegations contained in it in relation to this case;" also that "in weighing and considering and determining on which side the greater weight of the evidence is, the jury should not be influenced in any manner, or to any extent by the declaration, or by any statements therein contained." We conclude therefore that the rights of the appellant were not prejudiced by allowing the declaration to go to the jury; and that this error should not be regarded as reversible.

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The question of contributory negligence by the appellee, as a bar to his recovery, was raised on the trial; and the court instructed the jury, that the appellee could not recover in this case 'unless he himself exercised ordinary care for his own cure and recovery; and that the burden of proof was upon him to prove by a preponderance of the evidence that he himself exercised ordinary care for his cure and recovery; and that if the jury believed from the evidence, that he had been guilty of negligence in the care and treatment of his injuries, and contributed to the same, then you should find the appellant not guilty.' This instruction, which the appellant requested, submitted to the jury the question of contributory negligence on the part of the appellee; and the jury found against the appellant on that issue. We are of opinion, that the jury were warranted from the evidence in reaching that conclusion. There is sufficient evidence in the record to justify the jury in finding, that the charges of malpractice contained in the declaration were proven. It may also be pointed out, that the finding of the jury on these questions, involved a consideration of the credibility of the witnesses, concerning the matters

testified about, on this issue; and that the weight to be given to the testimony therefor, was the peculiar province of the jury. This court cannot say, upon a careful review of the evidence, that the jury should have found otherwise.

We find no reversible error in the record; and the judgment is therefore affirmed.

Affirmed.

236 I.A. 654

General No. 7758 Agenda No. 59

April Term, A. D. 1924

Martin Airola, Appellee

vs.

L. A. White, Appellant

Appeal from Sangamon.

NIEHAUS, J.

In this case, Martin Airola the appellant commenced suit in the circuit court of Sangamon County, to recover damages for personal injuries suffered by him on the 9th of January, 1922, when he came into collision with the automobile of the appellee, L. A. White, which was driven on the hard road at a point about five miles north of Edwardsville. The declaration charges, that the appellee was guilty of negligence; and that the appellant was in the exercise of due care and caution for his own safety, at the time of the injury. At a previous trial of the case, the appellant recovered a judgment of $1500.00, which was reversed by this court, because of an erroneous instruction given in his behalf on that trial. The case was thereafter re-instated in the court below; and another trial had, which resulted in a verdict in favor of the appellee of not guilty; and a judgment against the appellant for costs. From this judgment an appeal is now prosecuted.

Several contentions are made for reversal of the judgment. It is contended, that the verdict was manifestly against the weight of the evidence; and that the court erred in giving certain instructions for the appellee, namely, the 3rd, the 8th and the 9th. The 3rd instruction complained of is as follows:

"The court instructs the jury that if you find from the evidence and believe that the plaintiff's injuries, if any, were directly caused by the joint negligence of the plaintiff and the defendant, and if you so find they were both negligent, then your verdict must be for the defendant, not guilty."

This instruction does not appear to be subject to the criticism



made of it by the appellant; but embodies the well recognized principle of law, that if the injury was directly caused by the joint negligence of the par-

ties involved, that neither has a right of recovery. Appellant urges concerning the 8th and 9th instructions, that they are misleading; and it is contended that there is no evidence "even tending to show, that appellant saw or heard appellee's car approaching in ample time to have avoided being struck." Concerning this contention, it may be pointed out, that Albert Gockel, who was a witness for the appellant, on cross examination testified as follows: "It was about five minutes from the time we put the Ford back on the hard road before we saw any automobile approaching. At that time with the lights lit, you could see a car from two to three miles. That attracted my attention a little later on. I saw bright lights advancing from the south, it was quite a ways away. Had been ready to move, myself, about five minutes before I saw this car. We were standing talking to George Darling, the man we helped out of the ditch. Standing by his car, shaking hands with him. The automobiles were right opposite each other. That put us between the two. We were on the pavement. All the group together, when I said, boys here cames a car, 'I am going to flag it.' Martin Airola and my friend were there with Darling. I said that in a tone loud enough so they could hear. I suppose they heard. No one made reply. They got out of the way. Mr. Darling went over to his car. I don't know where Magri was, but Airola got in front of the Hudson car, and I got behind it to flag this man. When I told him there was a car coming he walked over in front of the Hudson car." With this evidence in the record, we must regard the point concerning these instructions, as not well taken: nor can we agree with the appellant, that the verdict of the jury is manifestly against the weight of the evidence. The appellant's right to recover depended upon proof of two matters of fact, which were in issue, namely, that the appellee was guilty of the negligence charged in the declaration ;and that the appellant at the



time of the injury was himself in the exercise of due care and caution; both of these matters were controverted questions in the case; and the evidence is in conflict concerning them. In order to reach a conclusion ,the jury had to pass on the credibility of the witnesses who testified concerning these matters. It is the peculiar province of the jury to settle questions of fact, that depend upon the credibility

of the witnesses; and a court of review is not justified in disturbing a verdict arrived at under these circumstances, unless it is manifestly against the weight of the evidence. In view of the fact that in this case there is evidence in the record tending to prove that the appellant was guilty of contributory negligence, which would warrant the jury in arriving at that conclusion, and inasmuch as the verdict has the sanction of the trial court, a court of review would not be justified in setting it aside.

The appellant also make a point on the refusal of the court,to allow the jurors to be interrogated on this proposition: "If you find from all the evidence in this case, and under the instructions of the court, that the plaintiff is entitled to recover, would you take into consideration all the elements of damages, which the court will enumerate to you in his instructions, and give to the plaintiff such an amount as you believe from the evidence, he is fairly entitled to recover, even though that amount might at first blush seem large?" It is apparent, that the real purpose of the question was to get an intimation from the juror whether he would be inclined toward small or large damages; and the question therefore comes within the lien of criticism made to questions of this character in the case of The People v. Robinson 290 Ill. 619. It was not error for the court to sustain an objection to the question.

We find no reversible error in the record; and the judgment is therefore affirmed.

Affirmed.

Opinion filed Nov 19 - 1924

General No.7761. Agenda 43.

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| GUY LIPE, a Minor, by Martha Lipe, his Mother and next friend, Appellee, | ) | 236 I.A. 654 |
| -vs- | ) | Appeal from Montgomery. |
| CLEVELAND, CINCINNATI, CHICAGO and St.LOUIS RAILROAD COMPANY, and CHICAGO and EASTERN ILLINOIS RAILWAY COMPANY, Appellants. | ) | |

Niehaus, J.

The Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, and Chicago & Eastern Illinois Railway Company, appellants, prosecute this appeal from a judgment rendered in the circuit court of Montgomery County, for the sum of $650.00, in favor of Guy Lipe, a minor, who instituted this suit by Martha Lipe, his mother and next friend. The declaration consists of four counts. In the first count, it is charged as negligence on the part of the appellants, that they violated an ordinance of the city of Witt, in running the train which caused the injury, within the limits of the city, namely, at a greater rate of speed than ten miles per hour. The second count charges, that the Poplar Street railroad crossing in the city of Witt, where the accident occurred, is travelled continuously by vehicles, day and night; and that the appellants put a flagman at the crossing, whose duty it was to give persons travelling on Poplar street, and approaching the railroad crossing in question, due and timely warning of the approach of a train; and that the flagman neglected to give such warning to the plaintiff, who was a child of tender years, and under the age of seven years; and that his injuries resulted in consequence thereof. The third count charges, that the flagman wilfully and wantonly went upon the crossing, and wilfully and wantonly held the horse, which was pulling the buggy in which the plaintiff was riding, and that by means thereof, caused the buggy in which the plaintiff

was riding, and the plaintiff, to be struck by appellant's engine, thereby injuring him. The fourth count charges, that the appellants wilfully and wantonly ran their locomotive engine, and cars, within the limits of the city of Witt in violation of the ordinance of the city, at a speed of fifty miles per hour; and that they wilfully and wantonly disregarded this ordinance; and that in consequence thereof the appellee was injured.

There was a trial by jury, which resulted in a verdict finding the appellants guilty, and fixing appellee's damages at $550.00, on which the judgment referred to was rendered.

It is contended on appeal, that the court erred in not sustaining the separate motions made by the appellants at the close of the evidence, to instruct the jury to find them not guilty as to each of the counts of the declaration. The court did not err in refusing to instruct the jury to return separate verdicts concerning the different counts in the declaration. It is also argued, that the court should not have given instructions in reference to the right of recovery, under the allegations of wilfulness and wantonness in the declaration, because, it is insisted, the evidence of such wilfulness and wantonness is wholly insufficient. The record however, discloses that there is some evidence tending to prove the charge; whether such evidence is sufficient or not, was not for the determination of the trial court, but was a question for the jury. Mahlstead v. Ideal Light Co. 271 Ill. 154. In this state of the record, it was proper to give the jury instructions concerning the matter of wilfulness and wantonness; and both sides recognized this situation by requesting the court to instruct the jury on this point. It is insisted also, that the proof does not show, that the injury to the plaintiff, was the proximate result of the negligence charged. This question was one of fact for the jury, under the instructions of the court; and the jury found against the contention of the appellants; and we are of

opinion, that the evidence fully warranted the jury in reaching their conclusion on this feature of the case. It is also contended, that the amount of the damages allowed by the jury is excessive. The evidence discloses, that the appellee suffered a concussion of the brain, which was so severe, that it rendered him unconscious; he did not recover consciousness until twelve o'clock of the night following the accident; and when he became conscious, he suffered much pain in the head, and his suffering continued at intervals afterwards. And the evidence also shows, that he had not entirely recovered at the time of the trial, which was nearly a year after the injury. While it is a just inference from the evidence, that his injuries are not permanent, and that he will finally recover completely, we are of opinion, that under the circumstances related, the amount fixed by the jury is not excessive as compensatory damages. It is insisted, that error was committed in a repetition of instructions concerning damages. Three instructions were given for appellee concerning the matter of damages, one with reference to the kind of damages that may be allowed in a case of this kind, namely, compensatory damages; and also exemplary damages, if the evidence showed that the injuries were wilfully and wantonly inflicted. Another instruction called the jury's attention to the different elements that enter into the question of damages; and which they might consider in connection therewith. Also an instruction which told the jury, that it was not necessary that any witness should have been produced to express an opinion as to the amount of damages suffered by the plaintiff. Each of these instructions treats the matter of damages from a different standpoint; and cannot therefore, be considered as unnecessary repetition.

We find no reversible error in the record, and judgment is affirmed.

Judgment affirmed.

236 I.A. 655

General No. 7625 Agenda No. 8

October Term, A. D. 1923

Agenda No. 18

October Term, A. D. 1923

The People of the State of Illinois, Defendant in Error,

v.

John Brinnegar, Plaintiff in Error.

Writ of Error from Ford County County Court.

SHURTLEFF, P. J.

Plaintiff in error was found guilty in the County Court of Ford County, at the June Term, 1923, on two counts in a criminal information, one count charging the possession of intoxicating liquor, for the purpose of being illegally sold and bartered, etc., and the second count in substance is identical. There were nine counts in the information, and the jury found plaintiff in error guilty upon all counts except the third and fourth. Upon motion in arrest of judgment, all of the counts, except the first and second, were dismissed upon the motion of the State's Attorney, and plaintiff in error was sentenced upon the first two counts.

The testimony upon which plaintiff in error was convicted on one of these counts, was as follows On the evening of May 26, 1923, two of the police officers in the city of Paxton saw five or six men walking south on the tracks of the I. C. Railway, north of the depot. Some of the men were white and some colored. They were one block east of Market Street, the main street of the city, and upon which street plaintiff in error lived. A train was approaching from the north, the light of which brought the men plainly into view. The officers who had been near the depot, walked north towards the men, who were then standing at the crossing about two blocks north of the depot. When the officers approached to about thirty-five feet from the men, they scattered and plaintiff in error, being one of them, started to run. One of the officers gave chase to plaintiff in error, and when within a few feet of him, plaintiff in error drew a bottle from his pocket and threw it into the weeds. This bottle, it was conceded, contained intoxicating liquor and when picked up, with the cork out, was still partially filled with liquor. Paintiff in error was arrested, and soon after being taken by the officer, he asked the officer if he had seen anything of his gun which he threw away. Plaintiff in error had no gun and his later statement of the circumstances and his evidence on the trial was:

"There was a fellow selling 'supposed to be whiskey.' He gave his name as Evans. A fellow named Reilly stepped up to me and said he tried to buy some whiskey from Evans and he wouldn't sell to him and asked me if I could get any. I said I knew him and he gave me two dollars and I bought him a pint of whiskey from this fellow. Reilly gave me the two dollars and told me to buy him a pint of whiskey from Evans." Plaintiff in error testified he had this bottle in his pocket when the officers came up and had not had it in his possession over three minutes. Plaintiff in error, while in jail, made a statement of the matter to the sheriff and others and to them stated that Reilly was a stranger, but, from plaintiff in error's testimony, it appears that he had known Reilly for some time. After the arrest was made, a search warrant was sworn out and the premises of plaintiff in error searched. A considerable number of jugs and bottles, some smelling of liquor, according to the testimony, were found in the cellar of plaintiff in error's residence and in the house. A half gallon of "hootch," "white mule" or whiskey, as it was variously called, was found in a glass gallon container, upon which the conviction on the second count is predicated. In the barn on plaintiff in error's premises, a bushel basket of empty bottles and four empty jugs were found. This barn had been rented by plaintiff in error to Evans, and he testified that in renting the barn to Evans, he had, as a part of the agreement, that Evans should not have any intoxicating liquor about the premises.

Plaintiff in error attempts to account for the half gallon of liquor in his house by testifying that about five years ago, while he was visiting a daughter in North Dakota, and his wife having "cramps" and the daughter not being well, the doctor prescribed whiskey; that he had always had whiskey in his home, prescribed for his wife ever since they were married; that he, at that time, purchased the jug full of whiskey at Fargo, North Dakota, and paid twenty-six dollars for it. Plaintiff in error denied ever having sold any intoxicating liquors, further than to have aided Reilly to procure the pint from Evans as set out. A witness by the name of Grant, an inmate of the county jail with plaintiff in error, testified to statements made to him by plaintiff in error, while in jail, giving an account of how much money plaintiff in error had made selling intoxicating liquors, and where the money was deposited, and states that plaintiff in error desired to back up the witness in the same business when witness got out of jail. These statements were vigorously denied. The witness Grant was

charged with the larceny of an automobile, but had not been tried. Five or six of the neighbors of plaintiff in error testified to his good reputation as a law-abiding citizen and it seems that he has not heretofore been a violator of law.

Plaintiff in error complains because the jury was selected upon the order of the court directing the clerk to issue a venire for twelve competent jurors, which venire was executed and the jurors selected by the sheriff, who was a witness in the case. No objection to this officer executing the venire or the method of the selection of the jury appearing of record, plaintiff in error has waived any such objection that he might have had if presented in apt time. **People v. Hawkins,** 306 Ill. 29. Neither did plaintiff in error make any objection to the officer who selected the jury, later testifying in the case.

Plaintiff in error, on motion in arrest of judgment, raised the question that the information was not properly verified, it being in the follownig form:

"C. M. Swanson after being duly sworn on his oath states that the within information against John Brinnegar is true," and contends that perjury could not be predicated upon this form of verification. Plaintiff in error cites cases, **People v. Clark,** 280 Ill. 160, and **People v. Honaker,** 281 Ill. 299, in each of which cases warrants were issued upon unverified informations, and it was held to be in violation of the constitutional rights of the accused, and other cases are cited in which it is held that the error may be taken advantage of on motion in arrest of judgment. But in this case the information was verified by the State's Attorney and in the language of the statute. (Smith's Ill. Stat. Chap. 37, Sec. 289, page 585.) No objection is raised to the matter set out in the information or the method of stating it and in the opinion of this court the form of the verification was sufficient. **People v. Kennedy,** 303 Ill. 423.

Plaintiff in error contends in a somewhat elaborate argument that the meaning of the word "possess" includes "having the title to," and that in the broad definition of the term, plaintiff in error could not be said to be in possession of the liquor procured for Reilly, because plaintiff in error never had the title to the liquor, but only procured the bottle as an agent, or as a friendly act, for Reilly. We cannot correlate this objection with Section 29 of the Prohibition Act (Smith's Ill. Stat. Chap. 43, sec. 29, page 789) which provides:

"It shall be unlawful to have or possess any liquor intended for use in violating this Act or property designed

for the illegal manufacture of liquor, and no property right shall exist in any such liquor or property."

If there could be no property right in such liquor, neither could plaintiff in error or Evans be said to have the legal title to it. If plaintiff in error's testimony was true, that he was aiding, abetting and assisting Evans in the sale or of furnishing of the liquor, then he was guilty as a principal and he was guilty of the unlawful possession of liquor with the intent to unlawfully sell or dispose of it or furnish it, as charged in count one of the information.

Plaintiff in error complains of instruction No. 6 given for the People, as to the rules to be applied in weighing the testimony of the defendant, which concludes:

"And give his testimony such weight under all the circumstances you think it justly entitled to." The objection is that this instruction does not confine the jury to the evidence in the case. This instruction is informal and omits the language "in evidence" and in some cases might constitute a grave error, but in this case the court instructed the jury for plaintiff in error: that they must decide the case from the evidence and the law and that they had no right to consider anything outside the case in so deciding, so that we do not consider the defect in the given instruction a reversible error in this case.

Plaintiff in error complains of the People's eighth instruction as to the law governing an accessory, but under the testimony in this case, we think the instruction properly stated the law.

The Court gave People's instruction No. 4 as follows:

"The Court instructs the jury that the possession of liquor by any person not legally permitted under the law to possess liquor shall be **prima facie** evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the law of this State."

The evidence upon this question was conflicting and the appellant offered testimony tending to prove that the possession of the one-half gallon of liquor was lawful. In this state of the record, the giving of this instruction was error. **Johnson v. Pendergast,** 308 Ill. 255.

The Court gave People's instruction No. 6 as follows:

"The court instructs the jury that a reasonable doubt means in law a substantial and well-founded doubt, and not the mere possibility of a doubt. The jury have no right to go outside of the evidence to search for or hunt up doubts in order to acquit the defendant, not arising out of the evidence or from the want of evidence."

The giving of this instruction has been condemned. **People v. Andrae,** 205 Ill., 461; **People v. Jordan,** 292 Ill., 514.

As to the second count in the information the evidence was close and conflicting, and upon this count the jury should have been accurately instructed. For the giving of the People's instructions numbered four and six the judgment of the lower court is reversed and the cause remanded to the County Court of Ford County for another trial.

Reversed and Remanded.

Upon a petition for a rehearing being filed, the opinion formerly entered was modified by reversing the judgment of the lower court and remanding the cause to the County Court of Ford County, with the directions that the appellant be discharged as to the second count, and that as to the first count in said information leave be given to the State's Attorney of Ford County to move for and with directions to the County Court of Ford County to enter a proper judgment upon the verdict as to the said first count of the information and to enter a sentence of either a fine or imprisonment, as provided by law, but not both, in accordance with the rule laid down in **People v. Elliott,** 272 Ill., 592, and **The People v. Barney,** 217 Ill. App., 322.

Upon a further reconsideration of the cause by the Court, in view of the holdings in **The People v. Goul,** 233 Ill., 630, and **The People v. Powers,** 200 Ill. App. 545, it is concluded that the form of reversal, as set out in the modified opinion on petition for rehearing, amounts to an affirmative on one count and a reversal on the other, and does not conform to the rule stated in the cases cited. The opinion of the Court as originally rendered, is therefore adhered to and the judgment of the County Court of Ford County is reversed and the cause remanded for further proceedings.

Reversed and Remanded.

Gen. No. 7769 Agenda No. 1.

October Term, A. D. 1924

The People of the State of Illinois, Defendant in Error,

v.

Tony Brush, Plaintiff in Error.

Error to the County Court of Christian County.

SHURTLEFF, P. J.

Defendant was convicted on information in the County Court of Christian County of violating the Prohibition Act, and upon judgment of conviction and sentence has brought the case to this Court, by a writ of error, for review.

The information was sworn to by the State's Attorney, upon information and belief, and there was a motion to quash the information, which was overruled by the court, and again plaintiff in error moved in arrest of judgment, which was overruled. This was error. The information filed by the State's Attorney, being verified upon information and belief only, was insufficient, under the authority of **The People v. Clark,** 280 Ill., 160, and **The People v. Shockley,** 311 Ill. 255, and the motion to quash the information, made by the plaintiff in error in the court below, should have been sustained and the information quashed. Defendant in error contends that the motion to quash and the court's ruling thereon has not been preserved in the record by the bill of exceptions. What was said in the case of **The People v. Steve Stanich,** Gen. No. 7751, at the April Term, A. D. 1924, of this court, applies with equal force to the case at bar.

For the error in not quashing the information the judgment of the County Court of Christian County is reversed.

Reversed.

236 I.A. 655

General No. 7774 Agenda No. 10

October Term, A. D. 1924

State of Illinois, Defendant in Error,

v.

Tony Brush, Plaintiff in Error.

Error to the County Court of Christian County.

SHURTLEFF, P. J.

On December 18, A. D. 1923, a bill for injunction, under the Prohibition Act, to restrain the defendant in error from maintaining a nuisance, was filed in the County Court of Christian County, returnable to the April Term, A. D. 1924, of said court. Upon application of defendant in error, a temporary restraining order was issued in said cause. Process of summons and a temporary injunction writ were served upon the plaintiff in error and on December 31, A. D. 1923, at the December Term of said court, the plaintiff in error entered his written appearance in said cause, and it was stipulated and agreed by the plaintiff in error, both in person and by counsel, that a permanent and final decree might be entered in said cause, as prayed for in the bill of complaint. The decree was entered upon December 31, 1923, the premises described in the bill and in the decree being a one story frame building, located upon the north one-half of lot number seven (7), in block four (4) of Tacusah addition to the City of Assumption, in Christian County, which were ordered closed for violation of the Prohibition Law of this State.

It appears that thereafter plaintiff in error, who was running a soft drink parlor in the City of Assumption, changed his residence to another part of the city, four blocks east from his place of business, and was residing with his family upon premises described as certain buildings and basements located on lots 88, 90 and 92, block 6, Assumption, the title to which lots was in Blanche Brush, the wife of plaintiff in error. The family of plaintiff in error consisted of himself, his wife, Blanche Brush, four children and the mother of plaintiff in error, who was about eighty years of age. On the 16th day of June, A. D. 1924, the State's Attorney presented an information to the court, charging that plaintiff in error had violated said permanent injunctional order and specifically charging that plaintiff in error on April 26, A. D. 1924, "at his place of residence, in the City of Assumption, in said county," had in his possession intoxicating liquors, described, kept for the purpose of sale,

and a similar charge was made covering the 13th of June, A. D. 1924. Plaintiff in error moved to quash the information, which was overruled. There was an answer filed denying the charges in the information, a trial by the court and plaintiff in error was found guilty of contempt of court and sentenced accordingly. Plaintiff in error brings the record, by writ of error, to this court for review.

Plaintiff assigns error upon the court's refusal to quash the information, on the ground that no premises were described in the information, and upon the further ground that said information, by its allegations, states that plaintiff in error violated the decree theretofore entered, upon information and belief, and does not state in what particular the decree was violated. As to the description of the premises we shall consider that question upon another assignment of error. We have examined the information carefully and do not find that any allegation is made upon information and belief. Every charge is positively asserted. The allegations of the possession of intoxicating liquor for an unlawful purpose on April 26th and June 13th, A. D. 1924, are in proper form and positively asserted, and the information is verified in substance and in fact. Plaintiff in error answered the information or charge, and we think the court ruled correctly in refusing to quash the information.

Plaintiff in error further assigns error and it is the main contention in this case, that all the testimony offered by defendant in error, as to the possession of intoxicating liquors on April 26th and June 13, A. D. 1924, was procured by the sheriff and his deputies by means of search warrants, and was incompetent and upon objection should not have been received, citing **People v. Castree,** 311 Ill. 405. It is true in this case that all of the testimony offered by defendant in error as to the possession of intoxicating liquor, kept for an unlawful purpose, was procured by the officer, through search warrants, issued on April 26th and June 13th, respectively, A. D. 1924, and plaintiff in error contends that under section 29 of the Prohibition Act, reading as follows:

"Whenever complaint is made in writing, verified by affidavit to any judge having cognizance of criminal offenses, that complainant has just and reasonable grounds to believe, and does believe that intoxicating liquor is manufactured, possessed or sold in violation of any law, he shall particularly describe and designate the premises, with the facts upon which such belief is based, then the judge may issue a search warrant: Provided, however, no warrant shall be issued to search a private dwelling

occupied as such unless such residence is a place of public resort or intoxicating liquor is sold or kept for sale, or possessed therein in violation of the law, * * *" that there were not sufficient facts stated in the complaints upon which the warrants were issued, to comply with the statute, as set out. It is contended that the complaints do not set out a proper description of premises; that the house or any of the buildings are not described. In the complaints the description of the property was set out, as set forth in this opinion, with the addition that it was situated in "the County and State aforesaid," and there is no county or state expressed or described in either complaint. The warrants issued add "the County of Christian and State of Illinois," but this would not correct a defective complaint. There is no particular description of the buildings or of any building situated upon the premises. It is charged in the complaint of April 26th that "Intoxicated persons have been seen coming from and going to said premises. Also, that intoxicating liquor is stored and kept for sale."

In the complaint of June 13th it is charged that: "In toxicating persons have been seen coming from and going to said premises. Also, that intoxicating liquor is stored on said premises for sale and distribution."

These complaints are very inartificially drafted and if plaintiff in error, prior to the trial, had filed a petition to impound the articles taken in the search, we should be strongly inclined to hold the testimony incompetent and reverse the decree.

In **The People v. Castree, supra,** on page 397, the court says:

"**In People v. Brocamp,** 307 Ill. 448, the question was presented for the first time in this court of the admissibility in evidence of stolen property which had been obtained by an unlawful search and seizure conducted by virtue of their office by State officers charged with the prosecution of crime. In that case, without a warrant such officers invaded the defendant's premises and without authority of law searched for and seized certain property alleged to have been stolen. It was a case within the exception mentioned in the **Gindrat case,** subversive of the defendant's constitutional right, and we held that while the court, on objection to the admission of evidence, will not stop the trial of the case and enter upon the trial of a collateral issue as to the source from which the evidence was obtained, where the defendant makes timely application, before the beginning of the trial, for an order directing the return to him of the

property or papers unlawfully seized, the court should hear and determine the question of the legality of the seizure, and if it erroneously refuses to do so and receives the property in evidence against the defendant over his objection, it is an error for which the judgment of conviction must be reversed. This decision was in accordance with the decisions of the Supreme Court of the United States and of many of the States of the Union."

And the Court further holds on page 405 of the Castree case:

'There are many decisions of State courts which hold the evidence obtained by an illegal search and seizure, in violation of the constitutional right of the defendant, admissible in evidence against him. Many of them are based on the proposition that the court will not stop the trial to investigate the collateral issue as to the manner in which the evidence was procured, and follow the case of **Adams v. New York, supra,** in that particular. Others, however, take the ground that the court will not make any inquiry as to whether the constitutional right of the defendant has been violated, but will leave him to pursue such remedies as the law gives him against the officers or other persons who have committed the injury. We prefer to adhere to our own decisions and those of the Supreme Court of the United States and of the Supreme Courts of the States which agree with them, as founded upon the better reason."

We conclude from these authorities that where the constitutional objection to the testimony first comes in the middle of the trial, the objection will not be entertained, and the Court's attention diverted to the trial of a collateral issue. Neither does the court, either in the **Brocamp** case or the **Castree** case, make any distinction between a trial before the court or a trial before a jury, and it is not for this court to point out that such a distinction should be made.

Plaintiff in error also questions the jurisdiction of the County Court to hear and determine this cause, and insists that the Act purporting to confer such jurisdiction is invalid, in that it does not pretend to be an amendment to the Act, entitled, "An Act to regulate the practice in courts of chancery." This question was not raised in the Court below and plaintiff in error has waived any error in this respect, by bringing the cause to this Court.

It is further contended that plaintiff in error cannot be charged in a contempt proceeding with maintaining a nuisance upon any other premises, or in any other place than

the premises described in the original decree. Section 22 of the Prohibition Act provides:

"When an injunction, as herein provided, has been granted, it shall be binding upon the defendant and shall act as an injunction in **personam** against the defendant throughout the State."

In the final decree, which was entered on December 31, A. D. 1923, the plaintiff in error was enjoined and restrained from manufacturing, selling, bartering, keeping or storing intoxicating liquor at, in, about or upon the premises heretofore described, or any other place in the County of Christian or State of Illinois, in violation of the provisions of the Prohibition Act of the State of Illinois," etc.

The information charged plaintiff in error with maintaining a nuisance at his residence in the City of Assumption, in the County of Christian and State of Illinois, and particular acts, in violation of said decree, were charged against plaintiff in error as having been committed at his said residence. In the opinion of this Court, it was not necessary that such violations be charged as having been committed upon or at the particular premises described in the decree; but, if the statute is valid, with which question this Court is not concerned, a charge of violating the Prohibition Act anywhere within Christian County was all that was necessary to charge that plaintiff in error had violated said decree.

Other errors charged are pointed out, none of which, except one, do we deem it necessary to discuss. It is contended that the testimony offered does not tend to show plaintiff in error's guilt. Intoxicating liquors, in considerable quantities, were found at the home and on the premises of plaintiff in error at two different times. At neither of these occurrences was plaintiff in error at home. At the time of the first raid Blanche Brush, wife of the plaintiff in error, was there and in charge of the home. On June 13, A. D. 1924, no one was found at the premises except the mother, a very old lady, who attempted to conceal the liquor. Plaintiff in error was the head of the family and as such has the general right to regulate the household and to exercise the general control of the family management. Plaintiff in error denied that he knew anything about these liquors and their presence upon the premises is not explained.

The Court below saw and heard the witnesses testify and was better quailfied to determine the issue of fact than this Court is from a reading of the record. There was testimony submitted tending to prove the allegations charged in

the information, and from a careful reading of the record it is the opinion of this Court that substantial justice has been done.

The order and decree of the County Court of Christian County is, therefore, affirmed.

Affirmed.

General No. 7784 Agenda No. 19

October Term, A. D. 1924

Standard Oil Company

v.

James Burbridge, Appellant, and Ed Willsey, Appellee.

Appeal from Pike Circuit Court.

SHURTLEFF, P. J.

The complainant, Standard Oil Company, filed its interpleader bill of complaint in the Circuit Court of Pike County against appellant and appellee, to determine which one of said parties was entitled to the fees for inspecting oils and oil products, at complainant's receiving station, in the vicinity of the City of Pittsfield, in Pike County, this State. The appellant is the acting and qualified oil inspector in and for the City of Pittsfield. Appellee is the acting and qualified oil inspector for the territory of the County of Pike, not within any city, village or incorporated town limits. The complainant is engaged in the business of vending petroleum, including kerosene, which is subject to inspection under the laws of this State and has a bulk storing station at or near said City of Pittsfield, in Pike County.

This controversy arises over the question whether complainant's products, shipped to and received at this storage station, are subject to inspection by appellant or appellee. For some time both parties have made inspections and fees have accumulated in complainant's hands, to to amount of $279.80, claimed by both appellant and appellee, and finding no other method of adjusting the dispute, complainant filed this bill. Appellant and appellee each answered the bill, setting up their respective claims. There was much testimony introduced involving the boundary lines of the City of Pittsfield; the exercise of corporate functions over territory adjacent to the receiving station and the method of receiving and inspecting the oil. There was a decree in favor of appellee and appellant was adjudged to pay the costs. Appellant has appealed.

Complainant has four large storage tanks situated upon lots 17, 18 and 19 in Quinby's second addition to the City of Pittsfield. These storage tanks are connected by pipes with a stand pipe or "unloading rack," situated upon a side track of the Wabash railroad, about 214 feet northwest of the storage tanks. This stand pipe or "receiving rack," and the pipes leading therefrom underground to the storage tanks, are all the property of and controlled and used by

complainant in handling its products. The storage tanks have a capacity of about eight cars of oil. The stand pipe or "receiving rack" consists of two two-inch pipes, rising from the ground to a height of twelve feet with arms extending over to the center of the side track from which pipes extend downward and are lowered into the car from which the oil is pumped, by a pumping station located at the storage tanks. Complainant receives its products in oil tank cars, the tank having a dome in the center and on its top, where the tank is sealed, and from which the oil is pumped. The method of inspection is to drop a bottle through the opened dome to near the bottom of the tank and obtain the bottle filled with oil. This is done when the seal of the dome is broken and the dome opened. Usually the inspector is there at that time, but if he is not he leaves his bottle with complainant's agent, who fills the bottle and delivers it to him. The tank is then unloaded by pumping through the pipes to the storage tanks. Sometimes trucks are loaded with oil at this "receiving rack." Appellant testifies that a few times he has filled his sample bottle from a faucet at the pumping station, but it is the undisputed testimony that oil obtained at this faucet comes from the mixed oil in storage tanks, and it is the faucet from which trucks are loaded at that place.

A great amount of testimony was introduced by both parties as to the location of the north boundary line of the City of Pittsfield and several surveys made and blue prints and plats offered in evidence, none of which, however, are in the record before us. Appellee insists that both the storage tanks and the receiving station or stand pipe are outside the City of Pittsfield. Appellant concedes that the stand pipe or "receiving rack" is about 13.2 feet north of the north **de jure** boundary line of the City of Pittsfield, and insists that the storage station is about 120 feet southeast of the stand pipe. This concession may be sufficient from which to determine the right of the parties to this suit. The Wabash Railroad has its station, a part of its main line and some side tracks within the corporate limits of Pittsfield. The contention that the Wabash Railroad on several occasions has paid city taxes on a greater length of trackage than it had within the corporate limits, and the further fact that the city authorities of Pittsfield had, on one or more occasions, hauled a few loads of gravel upon a highway leading to the stockyards, outside of the city limits, does not indicate such dominion and control as would established a **de facto** city government over that territory. The law provides that all oil shipped must be inspected by

the inspector at the receiving point (sec. 8, chap. 104, Smith-Hurd's Rev. Stat. 1923). The only question in this case to be determined is the "receiving point" of complainant's oil. Is it at the stand pipe or unloading rack, or is it at the storage tanks? There are two inspections of each car of oil received by complainant. One inspection is made by complainant's agent, on its behalf, as purchaser or consignee of the oil. The other is the public inspection. There are three oil companies, including complainant, receiving cars and handling products in the vicinity of Pittsfield. The testimony is overwhelming that the custom as to public inspection, at this place, is to take the sample at the stand pipe or "receiving rack." The statute provides that upon the arrival of any such oil, such inspector shall test the same with all reasonable dispatch by applying the fire test, and that if the oil does not mete the required test that the inspector shall mark on each cask, barrel or package, "condemned for illuminating purposes, fire test being——" (Sec. 3 and 4, chap. 104 Rev. Stat. supra. And it is further provided that if any dealer shall neglect to give notice to such inspector of any such oil in his possession within two days after the same is received by him, or if he shall use it without the same having been tested, he is subject to a penalty. (Sec. 7, chap. 104, supra). The purpose of the public inspection is to protect the public, of whom the dealer forms a part and in part the inspection is for his benefit. The language of the act seems to indicate that the terms "cask, barrel or package" would include the shipping tank car rather than the storage tanks, and it certainly would be construed as a violation of the act to mix and commingle untested oils from the tank car with the tested oils in the storage tanks, which would result, if appellant's construction of the situation is to be accepted. The reasonable construction of the situation in this case is, that the "receiving point" is at the car, "receiving rack" and stand pipe, and that the oils should be inspected and tested before any part of them is pumped from the car. This protects the dealer and is the "point and place" where the dealer receives and accepts the goods or rejects them. Any other construction permits an element of danger which the law was enacted to prevent. The learned chancellor below so construed the act, with which we are in perfect accord.

The decree of the Circuit Court of Pike County is affirmed.

Affirmed.

General No. 7795 Agenda No. 28

October Term, A. D. 1924

Ben Burkey By His Conservator, Hal Burkey, Appellant,

v.

A. P. Forcum, R. H. Kile, Appellees.

Appeal from the Circuit Court of Edgar County.

SHURTLEFF, P. J.

Appellant filed his bill of complaint to the June Term, A. D. 1923, of the Circuit Court of Edgar County, against appellees, charging that on the 20th day of August, A. D. 1919, appellees were the owners of a farm consisting of 143½ acres, situated in Edgar and Coles Counties, in this State, and described in the record as the "Green" farm, and that on the 26th day of August, A. D. 1919, and for many months previous to that date, the complainant, Ben Burkey, was and had been of unsound mind and totally incapable of transacting business or of understanding or appreciating the nature of any business transaction. It was further charged that a short time before the said 26th day of August Appellee Forcum, one of the owners, with full knowledge of the fact that said appellant was at that time insane and incompetent to purchase real estate, or to accept a deed therefor, used and exercised many undue arts and fraudulent practices, and resorted to falsehoods and misrepresentations to induce appellant to purchase said real estate, and did pretend to sell said land to appellant for a stated consideration of $34,798.75, and that appellees, relying upon the fact that appellant was not competent to transact business, actually obtained, in cash and notes, the sum of $38,331.25 from appellant. It was charged that shortly thereafter the appellant was adjudged insane by the County Court of Edgar County, and incarcerated in the Eastern Hospital for the Insane, at Kankakee, where he was at the time of filing the bill. It was further charged that since said pretended sale the Nelson Title and Trust Company of Paris, a corporation of Illinois, had taken a decree of foreclosure against said lands, and that said Company then had or claimed some interest in said lands, and was made a party defendant. The prayer of the bill was that the said transaction should be set aside, and the appellees be decreed to repay the said sum of $38,331.25 to appellant or to his conservator. Appellees answered the bill, admitting they had been the owners of the land and admitting the sale to appellant, but denied that appellant was of unsound mind and denied all fraudu-

lent practices. Appellees further answered that appellant was not adjudged insane for more than a year after said transaction; that said lands were well worth the price for which they were sold to appellant, but later declined in value, and appellees denied having received the amount of money from appellant set out in the bill.

The defendant Nelson Title and Trust Company answered the bill, showing the devolution of the title of said lands from Catherine P. Green and husband to appellant, and set out indebtedness to the amount of fourteen thousand five hundred dollars incurred by said Catherine P. Green and her husband, which was secured by trust deeds upon said lands before they were conveyed to appellees or appellant. The answer of the Nelson Title and Trust Company further shows that the lands were conveyed on August 20, A. D. 1919, to appellees, and on the same day were conveyed by appellees to appellant, subject to said trust deeds. It further appears by said answer that thereafter, on February 21, A. D. 1920, said appellant made two loans from said defendant Nelson Title and Trust Company, one for the sum of thirty-six hundred dollars and one for the sum of eight thousand dollars, and each was secured by two separate trust deeds upon said lands. While it is charged in said answer and stated in appellant's abstract that the trust deed for eight thousand dollars covers that part of the "Green" farm lying in Edgar County, the descriptions of land do not correspond. ~~However, appellant has made no intelligible statement of the case and we are able to get so little light upon the questions actually litigated, except from the record itself, that we conclude we should follow such admissions as appellant makes~~.

It further appears by said answer and by a trust deed offered in evidence, that appellant and his brother, Hal Burkey, now conservator for appellant, being indebted to the holder of the note in the sum of two thousand dollars executed a trust deed on the 21st day of February, 1920, acknowledged on February 27th and filed for record on February 28, A. D. 1920, covering a portion of said lands, to secure said indebtedness, and this and the other said trust deed indebtedness was held and owned by said defendant.

It further appears by said answer that on the 28th day of February, A. D. 1920, the said appellant, by a warranty deed, for a stated consideration of one dollar, conveyed all of said lands, with other lands, to his brother Hal Burkey, now acting as his conservator, and the deed was acknowledged and recorded on the same day. Said answer further

avers that all of said trust deeds became and were the absolute property of the said defendant, the Nelson Title and Trust Company; that it was the owner of such trust deeds, in good faith, for the principal sums of $1300, $3500, $8000 and $2000, and that a foreclosure suit had been instituted by said defendant to foreclose said trust deeds against said lands, and that the appellant and the said Hal Burkey had been made parties defendant thereto, and that a hearing had been had in said suit and a decree of foreclosure entered and a sale had taken place, and that the Nelson Title and Trust Company bid the amount of said indebtedness and now is the owner of said lands, subject to certain mortgage indebtedness. There was no replication filed to this answer and no charge in the bill of misconduct, or even knowledge of appellant's claimed defects on the part of the Nelson Title and Trust Company. A suit at common law had been started by appellant in the same court against Appellee Forcum and one Mickelberry, and we find in the abstract that "by agreement the two cases were consolidated," but upon a search of the record the order appears merely "to hear the two cases at the same time," which has resulted in much confusion by appellant abstracting the testimony in both cases and in this case arguing from each. There was a hearing before the court and a finding and decree dismissing appellant's bill for want of equity. Appellant has appealed from this decree. It is contended that the decree is contrary to the law and the evidence.

~~It is stated in~~ Appellant ~~brief that he~~ was adjudged insane by the County Court of Edgar County on August 28, 1920. ~~We find no such record but it is doubtless the fact~~.

Much testimony was offered by appellant and appellees bearing upon the soundness of mind of appellant and his life history and business transactions were traced from his boyhood. His ailment was diagnosed by Dr. W. K. Dyer, of the Kankakee Hospital, as dementia praecox. He left home when he was fifteen years of age, disagreeing with his father as to how to plant corn, and did not return for five years. He stayed at home a little while and then left again. He was thirty-nine years of age in February, 1924, and a bachelor. He showed little affection for his parents, had no close friends and was of a taciturn disposition. It was testified that he did not act normally, kept to himself, would not take to any one and did not keep clean. There was testimony that he slept with his clothes and shoes on and at one time kept to his bed for six weeks, with his clothes on. He would go to town and play with children

and throw nickels and dimes out into the street for them to "scuffle over." He would get up nights and go out barefooted in the snow, and while the record does not state, doubtless he replaced his shoes before returning to his bed. Homer Rideout and his wife worked and kept house for him for over a year in 1917 and 1918 in Ohio and Illinois and testify he would go to town and leave his horse tied in the street for twelve hours until a policeman would put it in; that he would bring men of low and vicious habits to the home and give them meals and never get any work out of them. He would sit around and pull his cap over his face and laugh to himself when there was nothing to laugh at, and would hide when anyone, friend or stranger, would come to the house. The testimony showed that he would neglect his farm work, leaving it all to his employees, and would make poor business deals. There was testimony that he bought some cholera hogs and they all died; that he paid one hundred dollars on an automobile and never went after it; that he bought a car load of milch cows and lost them all; that when threshers arrived at his farm he would not come home but leave the threshing to his hired help. One witness testified that he claimed to have talked to a dead sister and with the moon and stars and that they told him what to do. He collected and put rocks on the mantel and called them "Joe," "Bob" and "Bill." Appellant had many oddities and peculiarities from the testimony, and a number of witnesses testified from their knowledge of him that they did not think he was qualified to transact business in 1919. About 1914 appellant purchased a farm in Ohio, paying one hundred fifty dollars per acre and sold it in 1918 for one hundred ninety-five dollars per acre and came back to Illinois, purchasing a farm near Metcalf, in Illinois, for which he paid thirty-six thousand dollars and sold it about a month later, receiving a profit of twenty-four hundred dollars. The purchaser of this farm sold it about a year later for three hundred fifty dollars per acre or for a total of fifty-six thousand dollars. During the time appellant was in Ohio he worked hard, raised good crops and apparently made considerable money. He raised good crops on the farm near Metcalf, which was sold in August, 1919. He next purchased the "Green" farm, about which this bill was filed, paying $34,798.75 therefor. Between August, 1919, and August 28, 1920, when ~~it is said~~ he was declared insane, appellant did approximately one hundred thousand dollars in business connected with buying and selling land, and between ten and fifteen thousand dollars in business in and about selling his crops, dealing in stock

and the usual transactions of a farmer, concerning personal property and crops. During this time he borrowed money in considerable amounts at the Edgar County National Bank and the First National Bank, both of Paris, giving his notes therefor. He apparently was a man of means. He issued during this time to these banks ten different notes, aggregating $13,900, besides buying farming implements and the necessary merchandise to farm his lands. He traded during that time to the amount of fifteen hundred dollars at the store of J. P. Breen. Elmer McClain, an elevator and grain man, living at Metcalf, who was general superintendent of the American Hominy Company and in charge of from twelve to fifty-five elevators, purchased six thousand dollars worth of grain from appellant in the fall of 1919. In October of that year appellant went to McClain and secured an advance of twenty-five hundred dollars on his corn crop, and later husked and sold to McClain 4021 bushels of corn. McClain and his assistant, Spellman, who assisted in the transactions, Breen, the bankers and many others with whom he did business, all testified as to his soundness of mind and shrewdness in trade. Appellee Kile is the president of the Nelson Title and Trust Company and also is connected with one of the banks. When appellant purchased the "Hume" farm he secured a loan of twenty thousand dollars from the Nelson Title and Trust Company through Appellee Kile, and the trust deeds in all cases were made out to E. E. Gregg, one of the directors of the company. It is not suggested in the bill or by any proof that the Nelson Title and Trust Company used any fraudulent practices or even had any knowledge or information that appellant was not qualified to transact business. In August, 1919, when appellant purchased the "Green" farm, of which complaint is made in the bill, his brother, Hal Burkey, consulted Kile, appellee, and assisted his brother, appellant, and had a great deal to do in the consummation of the transaction, and in March, A. D. 1920, five months before ~~it is claimed~~ appellant was adjudged insane, the brother, Hal Burkey, who files this bill for his brother as conservator, had business transactions with his ward and accepted his deed for the "Green" farm and other lands at a nominal consideration. The conservator since appointed evidently considered appellant capable of transacting business in August, A. D. 1919, (**Kelly v. Nusbaum,** 244 Ill. 158) and especially is this so since the brother, later appointed conservator, accepted a deed from appellant in March, A. D. 1920. (**English v. Porter,** 109 Ill. 285).

It is held that although the mind of an individual may be to some extent impaired by age or disease, still, if he be capable of transacting his ordinary business, if he understands the nature of the business in which he is engaged and the effect of what he is doing and can exercise his will with reference thereto, his acts will be valid. **English v. Porter, supra, Kelly v. Nusbaum, supra.** The presumption of law, before inquest found, is in favor of sanity, and one alleging insanity has the burden of proof. **Kelly v. Nusbaum, supra.**

There was considerable testimony offered as to the value of the "Green" farm, at the time of the purchase, and while some of the witnesses for appellant testified that it was only worth one hundred forty to one hundred fifty dollars per acre in August, 1919, there were other witnesses who testified for appellees that the peak of the high prices for land in Edgar County was reached between April and October, 1919, and that this farm was worth at that time from two hundred thirty to two hundred fifty dollars per acre. There is no doubt but that land values had greatly deteriorated at the time this case was tried. There was no attempt made by appellant to establish any false statements made or fraudulent practices on the part of appellees. The whole case is based upon the insanity of appellant at the time of purchase. It is the peculiar province of the chancellor who saw and heard the witnesses in open court to determine the truth of the controversy, and it is not the province of this court to reverse the findings of fact of the chancellor, even though this court might have been inclined to find otherwise if we had been placed in his position upon the trial of the cause; so long as the finding of the chancellor is not clearly against the preponderance of the evidence, the finding will not be reversed upon review. **Schrader v. Schrader,** 298 Ill. 469; **Tobrice v. Van Der Brelie,** 190 Ill. 460; **Village of St. Ann v. Coyer,** 223 Ill. 96.

The chancellor found that at the time of said transaction the appellant was of sound mind and understood the nature and effect of his act, and was capable of understanding and transacting ordinary business affairs and was capable of knowing and did know the true intent and purpose of such transactions, and that the appellees did not practice any undue arts and fraudulent practices upon appellant, and did not deceive him in said transaction, and that the sale of said lands was free from fraud. And it was further found that the Nelson Title and Trust Company was not a party to said transaction, and that it made the loans, as set out in its answer.

We have read the record carefully and can arrive at no different conclusion than the findings and conclusion of the Circuit Court of Edgar County, and the decree of that court should, therefore, be affirmed.

Decree Affirmed.

7 On petition for rehearing, Opinion modified and adhered to and Petition denied.

236 I.A. 656

General No. 7768 Agenda 3

People of the State of Illinois, Defendants in Error

vs.

Russell Garwood and Ed. Killion, Plaintiffs in Error.

Error to the County Court of Edgar County.

CROW, J.

An information was filed in the County Court of Edgar County charging plaintiffs in error with carrying concealed upon their persons a revolver without having a license therefor contrary to the form of the statute. An information was filed against each severally but at the trial it was stipulated the two causes be consolidated and tried together, all the evidence applying to each. On trial by jury they were each found guilty. Motions for new trial and in arrest of judgment were overruled. Thereupon each was fined $100 and costs and committed to jail for a period of five days. To reverse the conviction a writ of error is prosecuted.

Substantially, the evidence shows Garwood and Killion went in an automobile to Paris from Indiana where they lived. The sheriff of Edgar County was informed they had revolvers on their persons. He, with deputies, went to the place where the automobile was parked and when defendants came to the automobile they were arrested by the officers. Garwood had two revolvers and Killion one. Being asked why they were carrying the weapons, they said they had a right to carry them. Asked if they were officers in Indiana they answered they belonged to the Anti Horse Thief Association. Without entering upon details of the evidence, it is sufficient to say the evidence shows the weapons were concealed upon their persons when arrested, though they contend they were contained in holsters strapped in front of their bodies and that they were clearly to be seen. At all events, the jury heard the evidence, saw the witnesses and found them guilty. We are not in better position than the jury to ascertain the question of their guilt. The jury were competent to determine where the truth lay when considering the evidence. The trial judge approved the verdict. There was so little real conflict in the evidence there is nothing in it to reconcile. This was the second time they had been tried on the same information.

With regard to the alleged errors in the giving of instructions attempted to be raised in the printed argument of counsel for plaintiffs in error, they are not subject to review. No errors touching them are mentioned in the brief.

Rule 23 of the Rules of Practice of this Court on that subject provides: "Following the statement of the case, the brief shall be concluded with the points made and authorities relied upon in support of them, * * * * no alleged error or point not contained in such brief shall be raised afterward, either by reply brief or in oral or printed agument, or on petition for rehearing." The rules of the court bind parties litigant in their application for relief. We do not, therefore, enter upon a discussion of the errors complained of on the assignment of errors with regard to instructions.

It is urged in the brief and in the printed argument the court erred in not allowing the motion of plaintiffs in error to require the surrender to them by the sheriff, of the firearms taken from them when arrested, on the ground of the invasion of a constitutional right to security in their persons, houses, papers, and effects against unreasonable searches and seizures. The basis of the complaint is the fact that, the sheriff having arrested them for having upon their persons concealed weapons, constituting a breach of the peace, he took from them the weapons and that they were to be used and were used, at the trial on the above mentioned charge against them. This contention is completely answered by Mr. Justice Scholfield in North vs. People, 139 Ill. 81 (106-7). It is there said: "But it is further objected, that even if Hodge had the right to arrest, this gave him no right to search for concealed weapons. The guaranty of the constitution in regard to search warrants applies only to cases where the purpose of obtaining the warrant is to make a search for goods. It has no application to arrests for particular offenses, consisting wholly or in part in having particular property in possession, nor to the seizure of dangerous weapons in the possession of the party arrested. In such cases the right of seizure is incidental to the right to arrest." So the doctrine laid down in People vs. Brocamp, 307 Ill. 454, cited by counsel has no application. We are not passing upon a constitutional question but upon the legality of an official act authorized by statute, the validity of which is not, and cannot be raised in this Court.

So far as anything in the record now subject to review is presented, we find no reversible error and the judgment of conviction is affirmed.

Affirmed.

General No. 7777 Agenda 12

Eva Lyons, Appellant
vs.
Nellie Carter, executrix of the last will and testament of Delilah Hornbach, Deceased.

Appeal from the Circuit Court of Pike County.

CROW, J.

Delilah Hornbach died testate, appointing Nellie Carter executrix of her will. Eva Lyons filed a claim in the County Court against the estate for the sum of $1000. Objections to it being filed, the County Court heard evidence, disallowed the claim and from that judgment an appeal was taken to the Circuit Court where it was heard by the court, a jury being waived. An order was there rendered denying the claim and rendering judgment against the claimant for costs. To reverse that order this further appeal is prosecuted.

The claim filed consisted of a promissory note as follows:

$1000.00 Dec. 14, 1917.

One day after date I promise to pay to the order of Eva Lyons One Thousand Dollars at six per cent interest from date until paid. Value received with interest at six per cent per annum.

Delilah Hornbach.

In the County Court, claimant introduced in evidence the note and rested. Counsel for executrix, without notice of any intention to do so, called claimant as a witness, subjecting her to a thorough examination as to the consideration for the note, the circumstances under which it was executed and the motive inducing Mrs. Hornbach to execute it. The examination, as might well be expected, was searching and quite extended. In the Circuit Court this evidence as transcribed by the stenographer taking it, was read as a part of the defendant's evidence. It was thereby developed Miss Lyons, the claimant, had been a neighbor of Mrs. Hornbach for several years. They resided in a rural settlement. She testified Mrs. Hornbach sent for her and in response to the invitation she went on the evening the note was executed. That no one else was in the house. She staid until late in the evening and had supper but left soon after supper. Miss Lyons wrote the body of the note and it was then signed. She says Mrs. Hornbach got the form but does not know where it came from but that claimant did not take it there. She says

Mrs. Hornbach asked her to fill it out for her. That after filling it out as she dictated she read it over again and then signed it.

As to the reason for the execution of the note, she testified she did not know the note was to be given her; that is was given for services rendered in different ways and at different times and helping her and being company for her and "visiting her lots" and being with her; she was lonely; "she liked me and I had visited her all my life; I had been company to her; the note is to pay for services rendered in different ways; I never worked for her; never charged her for anything I did; she placed the value on it herself; it is her valuation of the many different things I have done for her; she felt friendly to me; she told me when the note was made out that if ever a note was for value received, this was, and she said 'you are the closest friend I ever had in my life'; that it about all she said; she did not say anything about how much she owed me; I went when her husband was sick and staid a good deal of the time and helped take care of him; he died in 1913; she appreciated that; she had means and could pay her debts but I did not work out." She further testified this note was not given just to be collected at Mrs. Hornbach's death; that Mrs. Hornbach said that if she did not "pay it off" her estate was good for it; I never asked her to pay it. She was to pay it when she saw fit to pay it; I could have collected it but I was not to collect it until she saw fit to pay it.

The fore going is taken from the abstract of the record. There was much more, but largely a repetition. When the case was tried in the Circuit Court, the transcript of this evidence was read into the record. The claimant was then called by her attorney as a witness to explain her answers given on the former hearing. She denied making many of the statements the transcript showed she had made. When claimant undertook the explain her former testimony she denied much of the evidence first given detrimental to her case. When cross-examined by attorneys for defendant and asked with regard to discrepancies and why she had testified differently in the Circuit Court, she said she was "unprepared" in the County Court.

It was sought to show by the evidence that claimant rendered services for decedent after the making of the note. These services were of a trivial character. She stated she recalled no others. All were of such as neighbors in a rural community would render cheerfully under such circumstances and regard them purely as a matter of altruism—a

result of loving ones neighbor as oneself. Indeed all were rendered according to her evidence in that manner. We have by no means excerpted all the evidence as abstracted. Other evidence will be noticed later. But enough has been set down here by fair selection to outline the method of the disposition of this case. Ultimately such a disposition must be made upon the testimony of claimant, elicited under circumstances as nearly guarantying its truth as usually occur in judicial investigations of fact as **nisi prius.**

We are asked to reverse and remand the order of the Circuit Court with directions to enter judgment allowing the claim. To do so we must not only be able to say from a consideration of the whole record in the court below, it shows the court erred in disallowing it, but that there was no evidence tending to support the order actually entered. The concluding request of counsel is based upon a misapprehension of the evidence in the case and the law applicable to it. It must be conceded that in the course of review it is attributed to the trial court always that it had a better opportunity for appraising the evidence and giving value to each part of it as a whole than a court of review. Courts will not reverse merely because they believe from reading and comparing all parts of the evidence the judgment or order appealed from should have been different. We are not prepared to say after a careful consideration of all the evidence the Circuit Court was wrong. Then, too, it will be well to remember, two courts found the same way. It is true on the second trial more evidence was offered. But the evidence most to be considered is that of claimant herself denying she testified as the transcribed stenographic report of her testimony shows she did testify at the first trial. On the second trial she is not materially corroborated as to vital facts. Where she did not positively deny so testifying, she endeavors to minimize the force of it by addition, or explanation as to what she meant or intended when she did so testify. It cannot well be contended such explanations are worthy of much consideration under circumstances disclosed by this record. If the explanations and denials so lightly impress a court of review sitting far from the scene of the trial without knowledge of many of those countless considerations present that affect the weight and value of testimony before court and jury, how much more must they contribute to the value of the conclusion reached at the trial when all were present.

She says when she testified in the County Court her testimony was the result of not being prepared. If she had been called upon to give testimony upon a matter of opinion

requiring reflection and study the excuse would have more weight. But it was all directed to facts peculiarly within her knowledge alone for the lips of the only other actor were sealed by death. Her relations to the decedent were peculiarly within her knowledge alone. They were neighbors living only about a mile apart. Four years of the time these relations existed Mrs. Hornbach was a widow advanced in years with her only companion and solace deaf, and her mind thereby, if in no other way, veiled. At the death of her husband, claimant, and no doubt many others, though it does not appear in the record, gave of her time and friendly care to the bereaved one. It is a matter of fair deduction from common experience others did aid her during the time of husband's death. The claimant herself, the evidence tends to show, was not surrounded by conditions that would induce her to reject the companionship of a good woman. She lived with and kept house for two elderly brothers. It was not unnatural she would enjoy the companionship of one whom she knew as she knew Mrs. Hornbach. That the services she rendered were the outgrowth of her situation and not employment is shown by the fact indisputably disclosed at the first hearing when she was "unprepared" and testified all she did was without expectancy of compensation; that she made no charge for anything she did and expected nothing and that the note forming the basis of the claim was only Mrs. Hornbach's estimate of the value of her services and attentions. If her version of the transaction is true and if the note was executed as she says it was, and under the circumstances detailed by her, the transaction would seem to be no more than the generous, if effusive expression of gratitude toward a neighbor that had solaced her in bereavement and who in return probably received compensation in companionship. It is a result that might have found expression in a clause of her will, which the record shows she made, and would have been executed under those safeguards avoiding controversy. It is in such documents, executed in prescribed formalities, that pecuniary expressions of gratitude generally find expression.

Now, all the evidence tends to show that it was understood the note should not be collected during the life of the maker. There is evidence she often gave expression to her gratitude toward claimant for her attention and kindly offices. Claimant says decedent said she had no money but from her testimony and that of other witnesses it is plain she had plenty; that she was able to pay for any service rendered. Claimant says she told her the note

would be good after death. The fact claimant did not expect to collect or attempt to do so during the life of the maker but held it until her death, in connection with evidence as to her financial worth, the fact she was assured it would be good after the maker's death, the fact she was not to collect it during the maker's life, and many other circumstances show it was a mere gratuitous expression of kind feeling and only a testamentary bequest not executed under the necessary formalities rendering it valid. As a gift it was only a promise to make a gift in the future and therefore not enforceable. **Shaw vs. Camp,** 160 Ill. 425; **Williams vs. Forbes,** 114 Ill. 167. In the latter case it is said the gift is not executed until the note is paid.

As a promissory note it is not a basis for recovery in an action at law. Claimant's evidence, taken in its most favorable light, shows the note was given for services and kindnesses rendered before it was executed and for services to be rendered thereafter. Mrs. Hornbach's husband died in 1913; the note was made December 4, 1917; she died January 8, 1921. At the time of the making of the note there was no account stated between parties and a note given in consideration thereof in payment. If Claimant had brought suit against Mrs. Hornbach for services rendered and the evidence had been in the condition is now is, she would have failed in her action. Claimant's account of the transaction is Mrs. Hornbach sent her a note requesting her to come to see her. That she went pursuant to the request and staid until late in the evening and that during the time a blank note was produced by Mrs. Hornbach and claimant requested to fill up the blanks which she says she did and the maker signed it, and the claimant took it away with her. She says at a later time the note was produced when Mrs. Hornbach was at the house of claimant and stamps were put on it, none having been placed on it at the time of execution. If it be assumed that claimant's version of the relation of the parties is true as detailed at the trial in the County Court, the note was given as an expression of gratitude. The "value received" as shown by that evidence was one not to be measured in money's worth. The value was not commercial value. It was her "estimate" of value for services, companionship, the presence of one, a neighbor, to whom she could divulge her sorrows and in return receive sympathy. Nothing had ever been done as between employer and employee. Nothing was done in expectation of compensation. The evidence conveys no intimation deceased recognized a legal obligation to pay. There was therefore no legal obligation that

would sustain an action at law. At most the note was a promise to make a gift not enforceable. It is only a valid subsisting demand constituting a present cause of action that will constitute a consideration for a promissory note. But claimant says part of the consideration was future services. She does not say she was then employed to render services in the future. On the contrary she testifies she did not "hire out" and for that reason charged decedent nothing for what she did. There was no obligation on her part shown by the evidence to do anything for her friend. According to her own evidence she would not accept such an onerous condition. Not only so, but the evidence shows that in the lapse of little more than three years she did practically nothing for decedent—the extent of her service being to make some preserves, can some fruit and like trivial service. She was at the home when Mrs. Hornbach died and helped at the house for which she was paid ten dollars. Therefore there was no mutuality of obligation in that claimant was bound to serve and decedent to pay. So far as future services are involved as part of the supposed consideration, consideration is entirely lacking and there is no mutuality of obligation. It must be conceded as contended by appellant, the consideration need not be adequate, but however adequate or inadequate, the consideration must constitute an obligation, a binding to service or performance of whatever else it may consist. That element is entirely absent here.

Three propositions of law are submitted by appellant, one given, one modified and one refused. The first held by the Court is correct as far as it goes, holding the note **prima facie** entitling the claimant to recover. The second held as modified laid down a correct proposition of law that mere inadequacy of consideration would "of itself" be no defense in "this case." Insertion of the words "of itself" means only if that were all, it would constitute no defense. Much of the argument of appellant is devoted to establishing this proposition whereas it needs no such effort. Certainly the words "in this case" are not erroneous for it was the only case being considered and for that reason might well have been omitted. No doubt the court meant to apply the holding specifically to the case he was trying and carries none of the absurd implications imputed by counsel to the modification.

The third proposition is: "The court holds as a proposition of law, that there was within the law a consideration for the giving and delivering to Eva Lyons of the note here sued upon and that the claimant is in law entitled to recover

on said note and according to the tenor and effect thereof without any reference whatever to the actual value of the consideration for which the note was given as compared with the amount which it is was given for." This proposition was refused. The court was not sitting as a chancellor and was not trying the case upon equitable principles. The experienced judge presiding at the trial of this case knew very well the distinctions between trials at law and in equity in cases of this character. He saw the witnesses. He heard them testify. He had a better opportunity than this court to judge of their veracity, their straightforwardness and the weight to which their testimony was entitled. He heard the claimant testify in denial and explanation of her previous testimony in the County Court when not "prepared." He had before him her testimony that she was not to call on the maker of the note to pay it and that she was only to pay "if she saw fit to pay it." That she was not to "collect it till she saw fit to pay it"; that she was not to present it for payment. He heard the testimony as to the wealth of the maker, knew her to be financially worth it, and in the face of that financial responsibility took no steps to get the money on it until the only one that could deny the facts out of which liability would arise, was dead. If all the available testimony is worth anything it shows that if the note was genuine—and there is no evidence to the contrary—it was only to be paid after the death of the maker, thereby creating a gift void as a matter of law. It is apparent from a consideration of the whole record the proposition was refused because if held, would have committed the court to the necessity of rendering a judgment for plaintiff upon a mixed question of law and fact. The law was not applicable to the facts. He believed, and in that we concur, she was not entitled to a judgment as matter of law or fact.

We find in the record no material error affecting the judgment and it is accordingly affirmed.

Affirmed.

General No. 7786 Agenda 21

The People of the State of Illinois, Defendant in Error

vs.

Elbert Coulter, Plaintiff in Error.

Error to the County Court of Pike County.

CROW, J.

Plaintiff in Error was found guilty by a jury in the County Court upon an information charging him with operating a motor vehicle upon a public highway while intoxicated. He was fined $100 and sentenced to the County jail for a period of thirty days. To reverse the judgment of conviction he brings the record to this Court by writ of error. The errors assigned are: overruling motion for a new trial; motion in arrest of judgment; rendering judgment on the verdict; admission of improper evidence offered by the people; sustaining objection to material and relevant testimony offered by defendant; giving improper instructions on behalf of the people.

Not only the abstract but the entire record has been considered with care. It is a matter of regret that on the state of the record as it comes to us we must decline to review all matters necessary to be preserved by a motion for new trial. There is in the abstract of the record sent us a bill of exceptions signed by the trial judge that the evidence in the record was all the evidence and certifying also the instructions given for the respective parties as well as those refused. The bill of exceptions show also exceptions of defendant to all the rulings of the Court on the admission of evidence and the giving and refusal of instructions. But it does not contain the motion for a new trial. Nothing necessary to be preserved by that motion can be reviewed on appeal. Anderson v. Karstens, 297 Ill. 76; Village of Bradley v. N. Y. C. R. R. 296 Ill. 383; Graham v. People 115 Ill. 566; Harris v. People, 130 Ill. 457. Its authentication by the clerk is not sufficient. But under the last expression of the Supreme Court of this State exceptions to the ruling of the Court during the progress of the trial upon the giving and refusal of instructions and to the introduction of evidence preserved by bill of exceptions, errors assigned on those rulings are properly presented for review without a motion for new trial. People v. Perlmutter, 306 Ill. 495; Yarbert v. C. & A. Ry. Co., 235 Ill. 589; I. C. R. R. Co. v. O'Keefe, 154 Ill. 508.

An examination of the abstract shows that numerous errors were committed by the trial court in the reception

of evidence. The vital question at issue was whether Elbert Coulter was intoxicated while driving the automobile on the highway as charged in the information. He in company with two others had been to Quincy the night before the alleged offense. They left Quincy at eleven o'clock on their return to Pittsfield. The two persons in addition to Coulter were V. Williams and Fred Lane. The car belonged to Williams. Coulter testified that he drank no liquor before leaving Quincy and that no intoxicating liquor was taken with them from Quincy. The evidence shows that Williams was intoxicated. Different people met defendant on his way home and they were asked while testifying as witnesses for defendant whether he was intoxicated. The Court sustained objections to all those questions. One of the questions asked of the witness Fred Lane who was with the defendant was "when you reached Kinderhook, about noon of that day, on up until 2:30 when you left Elbert Coulter, was he or not under the influence of liquor?" Objection was made by the prosecution. The Court:—"The charge of drunkenness is here at 2:30 and I see no need of going back. Objection sustained." We are clearly of the opinion that the evidence showing that there was no liquor in the car when they left Quincy and there is no evidence that the defendant stopped anywhere to procure liquor or had an opportunity to procure liquor, these questions were competent and very material, and it was error to reject them. The answers to the questions were designed to exclude the opportunity of the defendant to become intoxicated after he left Quincy, there being no evidence that he was intoxicated when he did leave. As to all those questions, in the rejection of the evidence the Court committed reversible error. The Court not only rejected evidence of intoxication of the defendant before the time but at different intervals after he was arrested. Offers of proof were made that the defendant was not intoxicated at different intervals of time shortly after his arrest and this was rejected because not confined to the time of arrest. The ruling was clearly erroneous.

Complaint is made of the giving of the third, fourth, fifth, sixth and fourteenth instructions on behalf of the people. These instructions are obnoxious to all the objections made to them. The third is vicious because it states to the jury a question of fact is this: they were instructed that "whether a person is drunk or sober are facts patent to the observation of all." It is not the province of the Court to tell a jury a thing of that sort; it is not a question of law and was not a correct statement of fact because, whether a man is drunk or sober is not always a fact patent to ob-

servation. The fourth is erroneous because it tells the jury that a witness may state from his observation and the exercise of his perceptive faculties whether a person was or was not intoxicated without being confined to the detail of the combination of minute appearances from which he learned the fact. That may or may not be true, but common experience and ordinary reflection demonstrate that the inability of a person expressing his opinion as to the intoxication of another and being unable to detail appearances indicating such intoxication goes necessarily to the weight to be given to his testimony. The fifth instruction is bad because it tells the jury that if they conclude from the evidence beyond a reasonable doubt that the actions of the defendant were in any way influenced by his use of intoxicating liquor, then under the law he was intoxicated. The law prohibiting the driving of vehicles by intoxicated persons on the common highways is a salutary one but it must have a reasonable application and this instruction does not make such application. Instruction 6 is erroneous because it tells the jury they are not bound to believe the evidence of the defendant and does not contain the usual qualification, provided they believe that he has wilfully testified falsely with regard to the matter about which he was interrogated, and does not authorize the jury to consider the testimony of other persons testifying to the matters about which he testified and grounding the weight to be given his testimony in the light of the testimony of others. The 14th instruction contains this sentence which of itself vitiates the remainder of the instruction: "If you find from the evidence of one or more witnesses that the defendant has committed the offense charged in this case, and if from all the circumstances and conditions surrounding the transactions in question and the evidence you believe the facts as testified to by such witness or witnesses beyond any reasonable doubt in your minds, then you should find the defendant guilty although there may be an equal or greater number of witnesses testifying to the contrary or testifying that they do not know whether the facts charged are true or not true." The purpose of such instruction was to minimize the effect of the testimony of witnesses for the defendant and it doubtless had that effect.

We regard the evidence of the guilt of the defendant in this case as not free from doubt. It is necessary to a fair trial that the rulings of the Court on the admission of evidence and the giving of instructions under these conditions be reasonably accurate. For the reasons indicated herein, the judgment is reversed and the cause remanded.

Reversed.

General No. 7792

Agenda 27

Frank L. Wheeler and George L. Wheeler, Appellees,

vs.

Martha Huttonbrock and William H. Huttonbrock, Appellants.

Appeal from the Circuit Court of DeWitt County.

CROW, J.

This cause is in this court on appeal by which it is sought to reverse a decree of the Circuit Court staying appellants from committing waste. Appellees are owners of the fee in the lands described, and appellant, Martha Huttonbrock, is the tenant "for life only" under the terms of the will of George L. Wheeler. Appellees were the testator's children and Martha was his widow, and intermarried with William H. Huttonbrock.

The cause was heard by the Master in Chancery upon a "reference to take evidence and report his conclusions and rules to close evidence" as shown by the abstract. The abstract recites: "Report of Master filed with objections thereto and order of Court that objections to Master's report stand as exceptions." It further recites: "Hearing on exceptions to Master's report and exceptions overruled and decree making injunction perpetual awarded to appellees at appellants' costs." This recital is followed by prayer for and allowance of appeal "upon filing bond in $300 in thirty days from March 15, 1924, and a certificate of evidence in sixty days from same date." The abstract contains what purports to be the decree rendered by the Court with findings of fact sufficient to support the decree for a perpetual injunction.

A preliminary question of practice is presented by the brief of appellees. It is objected the abstract does not show a certificate of the Judge that the record contains all the evidence and therefore the decree is not reviewable. The rule stated is correct where the cause is tried upon evidence introduced before the Chancellor. It is not correct as applied to a hearing upon reference to the Master to take and report evidence and conclusions as in this case. When the Master filed his report of evidence, appending thereto his findings and rulings on objections to it, as shown by his supplemental report, it thereupon becomes a record in that cause. It was complete authority for the Chancellor's action in reviewing it upon exceptions. If the evidence reported by the Master did not contain all the

evidence upon which his conclusions were based, that fact was an appropriate ground for exception and the court would have required all the evidence to be returned. We accept to the fullest extent the principles as to the office of the abstract in appellate procedure embraced in the first topic of the brief for appellees. We have had occasion to apply them, but they are not applicable to this case.

We have read and considered the evidence as abstracted. We are not permitted in review of chancery records to accord any virtue to the Master's findings of fact or to the rulings of the Chancellor on exceptions thereto. In trials at law such practice is proper. But in chancery cases each tribunal, appellate as well as that of original jurisdiction, must determine for itself what the evidence establishes and the correct application of legal and equitable principles thereto. The evidence shows that appellant, William H. Huttonbrock, with the consent and acquiesence of Martha Huttonbrock, the rightful tenant for life, despoiled the premises of ever-green trees. They were planted by the ancestor of complainants as part of the freehold. These children to whom the freehold passes by the terms of the will of their father, the deceased husband of Martha, are entitled to have the freehold maintained in its integrity with shade trees and ornamental trees as the ancestor left them. The aesthetic notion of a life tenant will not be permitted, if resisted, to change that which the ancestor deemed of worth. In contemplation of law the life tenant is only a sojourner. Such tenant must respect the inheritance unless such respect will destroy or seriously impair the use of the land. That is not shown by this record.

The chancellor was conservative in the relief granted. No complaint is made of the failure to grant more of the relief asked in the bill. Appellants allege error in not apportioning the costs. That was a matter in the sound discretion of the chancellor. We approve his judgment in the exercise of that discretion. We find no reason for setting aside the relief granted, and the decree is affirmed.

Affirmed.

General No. 7800. Agenda 33.

T. R. Bane, Appellee,

vs.

National Fire Insurance Co. of Hartford, Connecticut, Appellant.

Appeal from the Circuit Court of McLean County.

CROW, J.

This appeal seeks to reverse a judgment of the Circuit Court in favor of appellee for a loss by fire against which appellant has issued its policy of insurance. The declaration is in the usual form on such policies. The original policy was for an amount not exceeding $1200, issued March 6, 1923, and afterward, April 24, 1923, additional insurance in the sum of $800 was issued, both expiring March 6, 1924. The original policy was issued and countersigned by Carl C. Kreitzer, the agent for the company. The additional insurance was endorsed on the policy in the usual way by him as agent.

The property insured was described as a one story shingle and composition roof frame building occupied as a stock stable located in Ellsworth, Illinois. The endorsement of additional insurance is, omitting matter not material: "In consideration of $22.72 additional premium the insurance on frame building is hereby increased $800, making a total of $2000 on building." The endorsement is signed by Carl C. Kreitzer, agent. After writing the policy Kreitzer put it in the vault of the bank where he was employed and of which plaintiff was a patron. After endorsing the additional insurance he put the policy back in the vault. He collected the premiums and reported them to the company. April 27, 1923, the property was burned. April 28, 1923, he reported to the company, through the general agency as follows: "April 28, 1923. National Fire Insurance Co. Chicago, Ill. Gentlemen: This agency had a total loss under policy 121376 T. R. Bane last night about 9:30 P. M. Cause unknown. Insurance $2000. I have no loss blanks on hand so kindly consider this due notice. Yours very truly." The company sent E. H. Sparry the latter part of May to adjust the loss. A contractor was employed by him to assist in the adjustment. After the contractor had "figured" on it, Kreitzer being "in and out," plaintiff and Sparry agreed upon $1268.43 as "sound value" and "loss or damage $1268.43."

Before entering upon the adjustment a non-waiver agreement was signed to which was attached an agreement as follows:

"National Fire Insurance Company
of Hartford, Conn.
Non-waiver Agreement.

Whereas, claim has been made against the National Fire Insurance Company, under its policy No. 121376 issued to T. R. Bane at its Ellsworth, Ill., Agency, for loss or damage to the property described in this policy, said to have occurred on April 27th, 1921, and

Whereas: an early ascertainment of the amount of both sound value of said property and of said loss or damage is desired by both parties hereto, and

Whereas: Eldridge H. Sperry has been selected by said National Fire Insurance Company as Adjuster to investigate and to adjust, either by agreement with the assured or through appraisal, the amount of said sound value and of loss or damage:

Now, Therefore, in consideration of the premises above recited and of the fact that said National Fire Insurance Company is not now prepared to either admit or deny liability, it is hereby agreed that any action taken by said Adjuster shall not be claimed or, in fact, be a waiver of any right or defense of said National Fire Insurance Company, notice being hereby given and accepted that Adjuster has no authority to make such waiver nor to bind his principal to pay any sum whatever, nor in any way other than as to the determination of the amount of said sound value and of loss or damage."

No word in reply was received from defendant afterward so far as the abstract discloses, though Kreitzer wrote a letter asking whether it expected to deny liability. The suit was begun by praecipe February 22, 1924.

The declaration avers that after giving notice of loss to defendant, the plaintiff and defendant agreed the amount of loss and damage was $1,268.43, and thereby proofs of loss were waived. It is further averred that after the loss and damage had been ascertained as described, the plaintiff was told by defendant no further proofs of loss would be required on the part of plaintiff and thereby defendant waived proof of loss as provided in said policy. In another paragraph it is averred defendant kept the policy of insurance in its possession until more than sixty days after said fire, when, on July 10, 1923, it delivered said policy to plaintiff, and thereby defendant waived proof of loss required by said policy.

Defendant filed the general issue and two special pleas. One avers plaintiff, without authority or notice to defendant, increased the hazard contrary to the terms and conditions of said policy of insurance. To this plea plaintiff replied by traverse of the averment of increase of hazard; and further, that all increase of hazard was with full knowledge and consent of defendant, wherefore defendant waived its right to avoid the policy and is estopped to now complain of such increase of hazard. The additional plea, called in the abstract the third, begins and concludes as a special plea in bar on the ground of failure to make proof of loss and under the **absque hoc** denies the waiver pleaded in anticipation in the declaration. The declaration having averred matter avoiding the necessity of averring proofs of loss, was good pleading. 26 Corpus Juris, page 196, Sec. 702. The general issue put the averment in issue. The cause was tried on the issues thus formed with a verdict and judgment for plaintiff for $1331.83, to reverse which this appeal is presented.

We shall not set out the evidence nor marshal it to establish the proposition it is sufficient to support the verdict. The jury having found for the plaintiff, in the absence of material error, the judgment will not be disturbed. The first question presented by the record is the alleged error in giving plaintiff's instruction numbered 1. It presented the question of waiver of the increase of hazard. Two questions were involved, one of fact for the jury, the other a question of law for the Court. As are all instructions properly framed, the jury were told if they believed from the evidence the facts therein stated, "defendant should be held to have waived the conditions of the policy with respect to the increase of hazard." The jury's attention was directed to the facts to be inquired of and then were told if they found those facts, as matter of law there was a waiver. On the mixed question of law and fact the jury found for plaintiff. Defendant says in criticism of the instruction, there was no evidence "defendant by its agent had knowledge of the extent and character of the increase of hazard and with such knowledge of the extent and character of increase of hazard consented thereto." On that the agent "so conducted himself" as to induce the plaintiff to believe the increase of hazard would not be objected to. Kreitzer who wrote the policy covering the loss had been an agent of the company for many years. He had written insurance for plaintiff on all his property. How much we are not advised. He was on the ground and as to that as all other insurance transactions was the

alter ego of his principal. He knew the conditions. There was nothing concealed from him. Insurance companies act, and can act, only through agents. After plaintiff took out insurance for $1200 he made an addition to his place of business. It may have added to the hazard of the risk. He wanted the insurance. The insurance company responding to that want, in the only manner in which it could act, sold the required additional $800 to him and he paid cash for it. About that there is no dispute. There is no room for controversy as to the fact. The agent may have believed the hazard was not increased. The evidence tends to show it was not, the manner of the use of the property considered. But for the time he was the insurance company, and under the most elementary principles regulating contracts originating in the relation of principal and agent concerning insurance contracts, it was bound by notice to him, if he had notice. The principal cannot avoid its contracts because its trusted agent used bad judgment in entering into them or failed to notify it of changed conditions, though increasing the hazard. This doctrine is peculiarly applicable to the contracts of insurance companies. Worthy institutions that take pride in the beneficial service they render. There was evidence warranting the instruction. It is one bearing upon the legal effect of the acts and conduct of the agent writing the insurance. The adjuster could not be ignorant of the fact. We find no fault in it.

Plaintiff's modified instruction 1 is criticised by counsel because they say it is not based upon the evidence; that "there was never any evidence of express waiver nor was there any evidence of any conduct by defendant respecting the proofs of loss." In this we believe counsel have overlooked or fail to appreciate the effect of evidence leading the learned judge to make a good instruction out of a bad one. The instruction referred to is: "You are instructed that the proof of loss may be waived by an insurance company and if you believe from the evidence in this case that there was either an express agreement between the plaintiff and defendant to that effect, or that there was such a course of conduct on the part of the defendant as was reasonably calculated to lead the plaintiff to believe that the company did not require such proofs of loss, then the plaintiff cannot be defeated simply because he did not furnish such proof of loss."

Kreitzer and plaintiff testified that after the adjustment, Sparry was asked if there was anything else to do and he said no. Asked how long it would be before the claim for loss would be paid, he said it would be only a short time

if he attended to it himself and that he was going on his vacation soon. Plaintiff testified Sparry said there was nothing else to do and that he thought plaintiff would get his money in about two weeks. If the jury believed Sparry on that occasion said that, or that in substance, then, if further proofs were not called for by defendant after the adjustment, they were authorized to find for the plaintiff under the instruction as modified.

On this subject of waiver, instruction 2, given on behalf of defendant and at its request, told the jury if they "further find there was no waiver by defendant of proofs of loss within sixty days" as defined in the instructions, they should find for defendant. It was clearly recognized in this instruction there was evidence upon which the jury might find one way or the other on that vital question, depending on their belief in the probative value of the evidence. It was not error to give the instruction complained of for plaintiff.

Complaint is made of the refusal of defendant's instruction 2 on the question of increase of hazard. The element of waiver was ignored in it and therefore it was improper as omitting an essential ingredient of the right of recovery. Defendant's refused instructions 3 and 4 were properly refused because they sought to have the jury advised "plaintiff must prove his case" by the preponderance of the evidence. What was plaintiff's case? They would not know, without being told what must be proved before the plaintiff's case would be made out.

On the subject of waiver and the law applicable, there being no error intervening in the trial court, the judgment must be affirmed. There is no provision of an insurance policy that may not be waived. 26 Corpus Juris, 281; **Phoenix Ins. Co. v. Hart,** 149 Ill. 513, where the question is fully discussed with citation of cases. Even the provision in a policy against a waiver may itself be waived. **Hancock Life Ins. Co. v. Schlink,** 175 Ill. 284 (291); **Insurance Co. v. Dawdall,** 159 Ill. 179 (184); **Orient Ins. Co. v. McKnight,** 197 Ill. 190. Waiver is a question of fact which the jury under the instructions of the court were peculiarly charged with determining. There was evidence in the record, which, with the inferences that might legitimately be drawn therefrom, tended to establish the waiver relied on. It was, therefore, the duty of the Court, as it did, to submit the question to the jury. As to the principle upon which waiver rests, reference may be made to **Bennett v. Union Central Life Ins. Co.,** 203 Ill. 439 **(450)**; **Western Underwriters'**

**Ass'n. v. Hawkins,** 221 Ill. 304; **Orient Ins. Co. v. McKnight,** 197 Ill. 190 (192). Many other cases might be cited in support of the prinicple relied on. The judgment of the Circuit Court is affirmed.

Affirmed.

General No. 7806 Agenda 39

Daisy Reiser, Appellee,

vs.

Thomas Cody, Appellant.

Appeal from the Circuit Court of Sangamon County.

CROW, J.

Appellee brought an action against appellant, charging him with many acts constituting negligence in driving his automobile at an intersection of two streets in the village of New Berlin so that he struck the horse drawing a vehicle in which she and her husband were riding, knocking the horse down, turning over the vehicle and severely and permanently injuring her and, among other injuries, producing a miscarriage. The declaration avers that at the time she was in the exercise of due care for her own safety. The cause having been tried by a jury, a verdict was returned for plaintiff for $3,500. Motion for new trial having been overruled, with exceptions, the judgment was entered on the verdict, and an appeal brings the cause to this Court for review upon fourteen errors assigned in the record.

We shall not review the evidence. There does not seem to be any material error either on the admission or rejection of evidence. The Court gave eight instructions for appellant and refused three. It is alleged the Court erred in refusing these three. We think the Court did not err in that respect. Instructions numbered 1, 2 and 6 given for the plaintiff are challenged as erroneous and likely to mislead the jury. We are of the opinion all are subject to the exceptions taken. The first told the jury, among other things, that if they believed defendant "so negligently and carelessly drove and operated his automobile while in the street" as to collide with the horse and buggy of plaintiff, they should find defendant guilty. The negligence charged was not general but specific. The vice of this instruction is in not specifying the negligence, or enough of it, as charged in the declaration to constitute a cause of action. It left the jury to find a verdict for the plaintiff if defendant was negligent without a limitation to that charged. The second error grows out of the first for it tells the jury if they believe from the evidence that the negligence of defendant in operating his automobile was the proximate cause of the injury, they should find defendant guilty. Negligence here is not limited, and is likely to mislead by an assumption defendant was negligent.

Instruction 2 tells the jury "the Court further instructs you that if you believe from the evidence that the plaintiff was in the exercise of that degree of care and caution that an ordinarily careful and prudent person would exercise under the same or similar circumstances, and **that the negligence of defendant was the proximate cause of the collision with the vehicle in which plaintiff was riding and the injury to plaintiff**" they should find him guilty. This is a clear assumption of negligence on the part of defendant. There is nothing in the instruction that tends even to rob it of that vice. Instruction 6 authorizes a recovery if the jury only believe from a preponderance of all the evidence that **the defendant was negligent,** and not confining the right of recovery to proof of any negligence specifically charged.

We are impressed with a conviction counsel for appellee was a contributing cause of the errors appearing in this record. He wrote the vicious instructions. He was arguing the case before the jury. At the time the presiding judge was reading and trying, as all trial judges do, to rescue plaintiff from the carelessness as well as the zeal of her attorney. The proper function of an argument to the jury, uninformed as to the bearing of evidence, and the application of the law to the facts, is to enlighten and assist them. If it goes beyond that it is misapplied energy and out of place. That appropriate function can be performed in only one way—state to the jury concisely those facts necessary to be proved to entitle the plaintiff to a verdict, or the defendant his defense. Then show by analysis and application of the evidence how the evidence establishes those facts. Having done that a succinct statement of such principles of law as counsel believe applicable may be stated. If the instructions have been drawn with that care prudence demands, the Court will read the law to the jury as counsel has stated it and the office of attorney as part of the Court will have been faithfully discharged.

But that course was not pursued in this case. While counsel for plaintiff was the chief offender, the other was not without fault. Many of the objections to the statements by plaintiff's counsel were well taken. To some, the Court sustained objections. In reply to some he stated he was reading the instructions and did not hear the remarks. Some of the rulings of the Court were ignored and the highly improper and provoking course was contemptuously pursued. Counsel was admonished of the consequence of his course. The Court would have been justified under the circumstances in administering discipline of an impressive

nature. As to counsel for defendant some of his objections were frivolous and ought not to have been obtruded into the case. The practice of demanding a ruling is one that ought not be pursued. Persistent violation of the rules of proper argument is error which will entail a reversal. The objection being made the Court might with entire propriety have rebuked such a course, and in that he would have been sustained. Decorum at trials tends to produce in litigants, jurors and attendants respect for courts and thereby the necessity for discipline is diminished if not vanished.

For the errors indicated in the instructons and for persistent misconduct of counsel probably conducing to the error, the judgment of the Circuit Court is reversed and the cause remanded.

Reversed.

236 I.A. 657

General No. 7813 Agenda 12

Cecil H. Murphy, et. al. Appellees,

vs.

Parker Bounds, et. al. Appellants.

Appeal from the Circuit Court of Macoupin County.

CROW, J.

By the abstract we are advised a suit was begun by petition for mechanic's lien. An amended petition was filed and to that an answer was filed. It is further shown by the abstract the master made findings of jurisdiction of the Court and "that the equities of the cause are with the defendant. He further finds that the complainants were subcontractors in the matter of the sale of the building materials by petitioners and that no notice was given as required by statute, and he finds that the bill should be dismissed. The order overrules the master's findings." Abstract, page 5.

On page 19, the abstract contains the following: "The order of the court defaulting the defendants who did not answer; the order of the court referring the cause to the Master in Chancery to take the proof and to report the same, together with his conclusions, and the order taking the same under advisement." On page 20 is an entry: the exception of the defendant W. S. Peebles to the rendition of the decree in this cause, and his prayer for appeal." Pages 5 to 19, inclusive, purport to contain the evidence. At the bottom of the latter page is the criptic statement: "The objections of the petitioners to the findings of the Master in Chancery." The decree is stated very briefly in substance only with no findings of fact. The report of the Master is not in the abstract nor are the objections before the Master or exceptions to the report before the Court. Five errors are assigned on the record, as shown by the abstract.

Rule 22 of this Court requires: "In all cases, the party bringing a cause into this Court shall furnish a complete abstract or abridgement of the record therein, referring to the appropriate pages of the record by numerals on the margin, and shall cause such abstracts to be printed in a neat and workmanlike manner, with small pica type and leaded lines, on one side only, on white paper." The purpose of the abstract is to avoid the necessity of "exploring the record" to ascertain whether alleged errors are well assigned. It is an abridgement of the record. "As said in City Electric Railway Co. v. Jones, 161 Ill. 47, "everything

on which error is assigned must appear in the abstract." Chapman v. Chapman, 129 Ill. 386; City of Roodhouse v. Christian, 158 Ill. 137; 2 shinn on Pl. & Pr. Sec. 1069." Gibbler v. City of Mattoon, 167 Ill. 18 (22); Bishop v. Lonons, 63 App. 351.

This cause having been heard by the Master on reference to take and report evidence and conclusions, nothing was open for review before the Chancellor unless the established order was pursued in bringing the case to his attention for decision. That order is, 1) taking the evidence; 2) making a written report thereon as to his findings and conclusions; 3) filing specific objections to the tentative report by the party dissatisfied with the findings and conclusions; 4) a supplemental report showing his action on the objections; 5) filing the report and conclusions with the evidence appended with the clerk. Being so filed if either party was dissatisfied with any finding or with a conclusion the Chancellor could act upon alleged error only upon an exception filed in the case, specifically pointing out the error relied upon. Henderson's Chancery Practice, page 540, 548, (Sec. 385); 604. By agreement or by order of court the objections before the Master may stand as exceptions before the Chancellor. Unless this order is pursued strictly, there is nothing for review by him except on a question of law. Hayes v. Hammond, 162 Ill. 133.

The abstract is destitute of any objection to the report before the Master or of exception before the court as to any fact found. It does not, therefore, show that the Chancellor erred in making the decree he made. The best that can be said is, it is only an index, with reference to the pages of the record where the necessary matter can be found. We do not know whether it is an accurate index or no, for as said by Mr. Justice Carter in the **Gibbler case, supra,** "It is the duty of parties bringing cases here for review to prepare and file complete abstracts of the record in accordance with the rules and such abstracts as we can safely rely upon. It is not our duty to perform this work of counsel, which, in detail, as to them is inconsiderable, but when imposed upon us is, in the aggregate, extremely burdensome."

It not appearing from the abstract filed that error was committed by the Court in ruling upon exceptions,—indeed, no exceptions appearing, the decree of the Circuit Court is affirmed.

Affirmed.

236 I.A. 657

General No. 7814 Agenda 13

Bonum Lee Kirk, Administrator of the Estate of John A. Anderson, deceased,

vs.

William Latur, et al.

Appeal from the Circuit Court of Champaign County.

CROW, J.

The record now before the court comes from the Circuit Court of Champaign County. It purports to be an appeal from that court. On the cover of the abstract and briefs is the name of one designating himself "guardian ad litem for Minnie Anderson." In the statement of the case he says, after stating the substance of the decree, "to this decree exceptions were taken by the guardian ad litem for Minnie Anderson, and an appeal prayed and allowed to this court." Looking at the abstract of the record, on page 22, to which reference is made for verification of the prayer and allowance of appeal, it is couched in these terse terms: "Decree and judgment in favor of Champaign County. Exceptions by C. S. Schneider, guardian ad litem, and an appeal prayed to the Appellate Court, Third District." Whether the prayer was allowed by the court, and if so, upon what terms, we are not advised. If terms were imposed, as the statute requires, there are no recitals that show a compliance with them.

Reading the abstract, we find on pages 23 to 28 a decree, referred to in the index to the abstract as "decree on the Kirk bill." In the second paragraph of division VI, "It is ordered, adjudged and decreed by the court that the said Minnie Anderson be and she is hereby forever barred from asserting, claiming or demanding any right, title or interest or distributive share or portion of said funds deposited with the County Treasurer of Champaign County, Illinois, under decree entered in this cause on April 30, 1924, arising from the estate or property of John Anderson, deceased." The abstract discloses she was once the wife of John A. Anderson, but divorced with liberal alimony. A microscopic examination of this decree as abstracted reveals no prayer or allowance of appeal. Did guardian ad litem appeal from the order of the court striking Mrs. Anderson's cross-bill from the files, or from the decree in favor of Champaign County? Indeed we are unable to say from the title of the case here who is appellant and who appellees. Kirk was complainant below and should be here designated as appellee, we assume, for the decree was in his favor.

These criticisms are not set down in a spirit of censoriousness. They are bottomed upon the soundest doctrines of appellate procedure. The sufficiency of the abstract is challenged. The rules requiring an abstract of the record are in the interest of conservation of labor as well as of expediting decisions on review by avoiding the reading of unnecessary matter to ascertain the point to be resolved by the appeal on writ of error. How voluminous soever the record may be, enough only need or should be printed as is necessary to present the exact points of contention. But that much must be stated. If not stated, the prayer for reversal ought to be denied, and that means the judgment will be affirmed, no ground for reversal appearing.

We are not without the guidance of authority in the decision we make. Beginning sixty years ago, in Kellehr vs. Tisdale, 23 Ill. 354, the Supreme Court threatened to refuse to review cases thereafter unless the abstract should be sufficient to present the point upon which error is alleged. Four years later the threat was repeated in Shackelford vs. Baily, 35 Ill. 387, in an opinion written by Justice Breese, who wrote the opinion in the **Kellehr Case.** In Roodhouse vs. Christian, 158 Ill. 137, the court applied the rule as to the necessity of a full abstract in deciding the case upon the complaint of erroneous instructions. The court refused to examine them for the reason they were not abstracted. In City Electric Ry. vs. Jones, 161 Ill. 47, Mr. Justice Cartwright speaking for the court says: "Everything on which error is assigned must appear in the abstract, and since none of the instructions given or refused so appear, neither this court nor the Appellate Court could be asked to consider the giving of the instruction complained of. In Gibler vs. City of Mattoon, 167 Ill. 18 (22), the court say: "We cannot reverse a judgment at the instance of one who, so far as we can see, has no interest in the matter. Nor are we called upon to explore the record to find the alleged technical errors to sustain the assignment of errors as to the first mentioned eleven plaintiffs in error and to pick out the several tracts owned by them, if any. * * * * It is the duty of parties bringing cases here for review to prepare and file complete abstracts of the record in accordance with the rules, and such abstracts as we can safely rely upon. It is not our duty to perform this work of counsel, which, in detail, as to them is inconsiderable, but when imposed upon us, is in the aggregate extremely burdensome. It is not meant to be said the record is voluminous in this case or that the abstract is deficit in other respects not mentioned, but the rule is the same in all cases

and should not be relaxed. The point is raised by defendant in error that under the assignment of errors as made and from the record as abstracted no error authorizing a reversal appears, and this point must be sustained. No error appearing the judgment of the County Court is affirmed. In Phillips vs. Benfield, 249 Ill. 139, the court refusing to review the case on error, affirmed the decree of the Circuit Court saying: "As the errors assigned upon the record are not made to appear by the abstract of the record filed in this case, the decree of the Circuit Court will be affirmed." Many decisions in the different Appellate Courts might be cited to like effect, but we prefer to rest our judgment upon the authoritative expressions of the Supreme Court.

It not appearing from the abstract filed that the decree rendered is erroneous as to Minnie Anderson, it is affirmed.

Affirmed.

236 I.A. 657

General No. 7818. Agenda 15.

Theresa Formera, Administratrix of the Estate of Wenzel Formera, deceased, Plaintiff in Error,

vs.

Robert L. Reilly, Defendant in Error.

Error to Circuit Court of Sangamon County.

CROW, J.

Action by plaintiff against defendant and Thomas Lawler under the injuries act for the death of her husband. At the trial plaintiff dismissed the suit as to Lawler and the trial proceeded to verdict for the other defendant. Motion for new trial having been denied judgment was rendered in bar of the action and for costs. To reversce the judgment a writ of error is prosecuted, the usual errors being assigned, with one additional, not usual,—the 8th.

The case succinctly stated is: deceased in the night was standing on the north portion of the concrete road leading from Springfield to Beardstown. A wagon with team attached was between him and the edge of the hard road, two wheels being on the concrete and two on the "shoulder." Several automobiles were coming toward him. Their headlights were plainly visible for some distance as the cars approached. They were driving rapidly. As they approached, Maxwell, who was on the wagon, told Formera to "swing in." One of the cars struck him, killing him instantly. He was standing with one foot on the hub of the wagon and the other on the hard road. The evidence was conflicting as usual in such cases. A careful reading of it as abstracted fails to convince us the verdict was against the weight of the evidence, much less are we convinced it is, as contended by counsel, manifestly against its weight. No useful purpose would be subserved by amplifying these statements of our conclusions by review of the evidence, or by argument in support of the conclusion. The trial court was in better position to appreciate the evidence than we. There were two phases of the evidence presented at the trial—that relating to the conduct of the defendant and that to the conduct of the plaintiff's intestate at and immediaely preceding the collision resulting in his death. Those phases are presented to us. We are not warranted in setting aside the verdict and putting the cause to a new trial because the circumstances of the death are harrowing. However distressful, they must not be allowed to override judgment. The gravamen of each count of the declaration is

negligence. Howsoever grave the consequences of the death of plaintiff's husband, she, suing as his representative to recover compensation under the injuries act for his death must prove, as an ingredient of her right of recovery, that at and immediately before his death he was in the exercise of that degree of care and caution that should have been exercised by an ordinarily prudent person under the circumstances attending his death. If all that is urged by counsel for appellant is true as to the conduct of appellee, a charge of wilfulness would have exempted deceased from the standard of care required on a charge of negligence only. Neither do we find anything in the record that indicates the jury were moved by passion or prejudice in arriving at their verdict. We are not unmindful there are many things occurring at trials not finding their way into the record. But sympathy, compassion for those bereft in the manner disclosed by this record is usually the subject of complaint by defendants. If the jury did not believe from the evidence that deceased was in the exercise of the degree of care demanded, they could find no other verdict than that returned.

Complaint is made that the Court refused this instruction asked on behalf of plaintiff: "The Court instructs you as matter of law that any person driving a motor vehicle or a motor bicycle upon a public highway in this State, in a race, is unlawful and each person engaged therein is held to be guilty of a misdemeanor." The Court very properly refused it, for no other reason than that the fifth given for plaintiff more aptly and concretely informed the jury on the matter to which it relates abstractly. Another valid reason for refusal is, it related to the criminal aspect of defendant's act and that was not then directly involved.

Another refused is: "The Court instructs the jury that the plaintiff's decedent Wenzel Formera, had the lawul right to be upon said public highway, and that while thereon, and in any part thereof, was legally upon said highway." The best that can be said of this instruction is, it is a **non sequiter.** As matter of logic it provokes the inquiry, "what of it?" As matter of law it had no application, near nor remote, to the issues then at bar. It was properly refused.

The Court gave at request of defendant an instruction numbered 1: "The Court instructs you that the burden of proof is upon the plaintiff to prove her case by the greater weight of all the evidence. This means that she must prove by the greater weight of all the evidence that, 1) the defendant was guilty of negligence; 2) that the deceased was in the exercise of due and proper care and caution for his own safety immediately prior to and at the time of the

injury; 3) that the negligence of the defendant caused or brought about the injury without any contributory negligence on the part of the deceased. Unleess the plaintiff proves all these things by the greater weight of all the evidence, then you should find the defendant not guilty." We confess our failure to fully understand counsel's objection to this instruction. The sum of the objections seems to be in the last four lines of his criticism, following: "The instruction has a tendency of increasing the burden of proof on the part of plaintiff, and did mislead the jury, and should have been refused." The instruction is one given in substance in nearly every case of this character. It intelligently advised the jury of the essential elements of a right to a verdict. No one of them is claimed to be erroneous. Each states the law, the legal necessity of proving three ingredients of plaintiff's case and states the corollary, if plaintiff fails to prove either, she must fail. It follows the Court did not err in giving the instruction.

Finding no error in this record warranting a reversal, the judgment of the Circuit Court is affirmed.

Affirmed.

236 I.A. 657

General No. 7754. Agenda No. 2.

People of the State of Illinois, Defendant in Error.

vs.

Henry Wagle and John Moon, Plaintiffs in Error.

Writ of Error to McDonough.

NIEHAUS, J.

The plaintiffs in error, Henry Wagle and John Moon, were indicted in the circuit court of McDonough county for violations of the Prohibition Act. The indictment returned by the grand jury charged them with unlawfully and wilfully transporting intoxicating liquor without having a permit or license to transport the same; that they did unlawfully and wilfully transport in an automobile upon the public highway of the state, without then and there having a permit and license to transport the same; and that they did unlawfully and wilfully deliver intoxicating liquor without then and there having a permit and license to deliver the same, contrary to the statute; and that they did unlawfully have and possess intoxicating liquor then and there intending to sell, barter, transport and deliver intoxicating liquor, without then and there having a permit and license to possess the same; and that they did unlawfully and wilfully have and possess intoxicating liquor, without then and there having a permit and license to possess the same. A motion was made, by the plaintiffs in error, to quash the indictment and each count thereof, which motion was denied. Afterwards the defendants were arraigned and pleaded not guilty, and upon a trial the jury found the plaintiffs in error guilty in manner and form as charged in the indictment. A motion for new trial and in arrest of judgment was made and overruled by the court; and the court thereupon sentenced each of the defendants to be confined in the county jail for a period of seventy five days; also assessing against each of them a fine of $300.00 with the costs of conviction. This writ of error is prosecuted to reverse the judgment.

A number of objections are raised to the sufficiency of the various counts of the indictment; also concerning the instructions. We are of opinion that the first, second, fourth and fifth counts of the indictment are legally sufficient when considered in connection with Section 39 of the Prohibition Act; and these counts are competent to sustain a general verdict of guilty on the indictment. People v. Donaldson, 255 Ill. 19. Our examination of the instruc-

tions results in the conclusion that they contain no reversible error.

The serious question in the case is, the sufficiency of the proof of the corpus delicti. The evidence shows, that a police officer, walking along the south side of East Washington street, near the residence of Lamber Hillyer, in the city of Macomb, at about 1:30 p. m. on February 3, 1923, saw the plaintiffs in error, who had apparently alighted from an automobile which was standing in front of the dwelling house mentioned; they carried three tin cans into this house; the plaintiff in error Wagle carried one can; and John Moon carried two cans; and carried these cans on the top of their hands. In a few minutes after they had carried the cans into the house, they returned to the car and drove away. Afterwards and later in the afternoon of the same day, a search warrant was sworn out, and the Hillyer house was searched; and upon the search three tin cans were found in the house; two cans contained grain alcohol, such as is used for beverage purposes; and the other tin can, was empty, but had in it the odor of alcohol; three quart bottles and two eight ounce bottles, containing alcohol, were also found in the house. The proof of the identification of the tin cans which were found in the house, merely goes to the extent of showing that the tin cans found were like the ones which the officer saw the plaintiffs in error carry into the house, and is clearly not conclusive evidence to establish even the fact that the tin cans found in the house were the identical cans brought in by the plaintiffs in the case; and there is no positive proof that the cans which the officer testifies, he saw in the possession of the plaintiffs in error, contained any liquor of any kind at the time the cans were carried into the house. For ought anything, that appears in the evidence, the tin cans carried into the house, (assuming that they were the same cans) may have been filled with alcohol after they had been taken there; the proof made might give rise to a well founded suspicion or surmise that intoxicating liquor was in the cans which the plaintiffs in error carried into the house; but this character of evidence cannot be regarded as sufficient to convict a person of a crime. The hypothesis that the plaintiffs in error carried empty tin cans into the house, is just as reasonable as the hypothesis that they carried tin cans containing intoxicating liquor into the house. The evidence in this case does not go beyond raising a well founded suspicion, or surmise, that liquor found in the tin cans, and the bottles in the Hillyer house, was brought into the house by the plaintiffs in error. It does not establish the guilt be-

yond a reasonable doubt. Concerning the necessity of conclusive proof of the corpus delicti, the Supreme Court in a recent case, People v. Engle 313 Ill. 516, makes the following comment: "It was encumbent upon the people in this case to prove the corpus delicti beyond a reasonable doubt. The guilt of a person accused of crime cannot rest upon guess, surmise, or speculation, but must be proven by evidence establishing beyond a reasonable doubt every material element of the crime alleged in the indictment."

For the reasons stated, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

236 I.A. 658

General No. 7770. Agenda No. 5.

A. L. Michaels, et al., Defendants in error.

vs.

Blanche Brush, et al., Plaintiffs in error.

Error to City Court of Pana, Christian County.

NIEHAUS, J.

This suit was brought by A. L. Michaels and Sons, in the city court of Pana to recover the sum of $1211.44, claimed to be a balance due for the purchase price of certain property consisting of a garage with the stock, tools and merchandise therein. The declaration avers that the property mentioned was sold to the plaintiff in error, Blanche Brush and her husband, Tony Brush, and that amount stated is the balance due therefor. The defense to the claim was made on the ground that the property in question was not sold to the plaintiff in error, and her husband jointly, but only to her husband; and that therefore, she was not liable for the balance due. There was a trial by jury, which resulted in a verdict for the amount of the claim, and against both the plaintiff in error and her husband. A writ of error is prosecuted from the judgment.

It is insisted by the planitiff in error, that the verdict concerning the question of the joint liability, which was the main controverted question in the case, is against the weight of the evidence; and that the judgment should therefore be reversed. The record discloses, that the determination of the question of joint liability involved passing upon the credibility of the witnesses who testified concerning the sale transaction. And it is apparent from the verdict, that the jury believed the version of the transaction of the sale, which was testified to by the defendants in error; and that they placed more credence upon the testimony of the defendants in error than the testimony of the plaintiff in error and her husband. It is the peculiar function of a jury to pass upon the credibility of the witnesses who testify concerning the controverted questions of fact; and a court of review 'will not substitute its own judgment for that of the jury, unless it is clear that the jury has made a mistake, or was actuated by passion or prejudice.' People v. True 314 Ill. 89.

Objections are urged against some of the instructions; particularly against the first one, given for the defendant in error. We do not find, however, that the instructions objected to, are subject to the criticism which is made of them by the plaintiff in error. Instructions 1, 2 and 3, given for

the plaintiff in error, distinctly submitted to the jury the question, whether or not she was a party to the contract of sale, which in effect determined the question of joint liability; and the jury by their verdict found against her on that question; we cannot say, that they were not warranted in their finding.

The record does not disclose any reversible error in the trial of the case; and the judgment is therefore affirmed.

Judgment affirmed.

4202a

236 I.A. 659

Opinion filed Dec. 2nd 1924
No Rehearing asked for

Plaintiffs Attorneys R. C. Hickman and H. E. Morgan
Defendants Atty. Roy C. Martin State Atty.
Hon. S. M. Nerd trial judge

STATE OF ILLINOIS

# APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1924.

Term No. 15. Agenda No. 15.

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| THE PEOPLE OF THE STATE OF ILLINOIS, *Defendant in Error,* vs. JOE MORESE, *Plaintiff in Error.* | Error to County Court of Franklin County. |

BARRY, J.

Plaintiff in error and his brother-in-law, Joe Parruquett, were found guilty of unlawfully possessing a still; the illegal manufacture of intoxicating liquor; and of unlawfully possessing intoxicating liquor. The Court set aside the verdict as to Parruquett and granted a new trial to him, but overruled the motion of plaintiff in error and entered judgment on the verdict.

It is contended that the evidence fails to establish the guilt of the plaintiff in error beyond all reasonable doubt. The record discloses that plaintiff in error leased the J. Barrett farm of 80 acres and was in possession thereof; that there is a woods adjoining said farm in which the officers found two stills buried in a cave; one was a 50 gallon and the other a 300 gallon still. They also found another cave in which there were 300 gallons of whiskey in 50 gallon barrels. The testimony on the part of the People is to the effect that the appearances were such as to indicate that some of the liquor had been buried for some time and that more of it had been placed

there the night before it was found. It had rained the day before and the dirt was fresh. There was evidence to the effect that there was a path from the still to the house where plaintiff lived and that there was no indication of a path in any other direction; that there were fresh tracks along the path which had the appearance of having been made by a sled. The officers followed those tracks from the stills to plaintiff's house where they found a sled which bore indications of having been recently used. Plaintiff was the owner of the sled and several of the barrels of whiskey were marked "Joe Parruquett." The officers also found a gasoline stove where the liquor was. The stove had several burners, three of which were new, and they found three old burners of the same kind at plaintiff's home.

Plaintiff in error denied all knowledge of the stills and whiskey, but admitted that he owned the sled. He did not deny that there were tracks of a sled along the path from the house to the still, nor did he deny that the only path in that vicinity led from the house to the stills. The jury were the judges of the weight and credibility of the evidence. From a consideration of all the evidence. From a consideration of all the evidence we cannot say that there is clearly a reasonable and well-founded doubt of the guilt of the accused. That being true we would not be warranted in interfering with the verdict on the ground that the evidence does not support it, People vs. McCabe, 306 Ill. 183-187.

It is argued that the Court erred in striking out an answer of the witness Barrett. If the Court made such a ruling it does not appear in the abstract. Errors relied upon to effect a reversal must be made to appear by the abstract, People vs. Paul, 167 App. 557-559; Gage vs. City of Chicago 211 Ill. 109. It is argued that the Court erred in refusing plaintiff's 17th, 18th, 19th and 20th in-

structions. We have carefully considered the matter and find that the substance of these instructions were fully covered by several of the sixteen instructions given at his request. Finding no reversible error the judgment is affirmed.

AFFIRMED.

NOT TO BE REPORTED IN FULL.

H203a

236 I.A. 659

STATE OF ILLINOIS

# APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1924.

Opinion filed Dec. 2nd, 1924. No rehearing asked for

Term No. 16. Agenda No. 16.

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| THE PEOPLE OF THE STATE OF ILLINOIS, *Defendant in error,* vs. JOHN ARONDELLI, *Plaintiff in error.* | Error to County Court of Franklin County. |

Plaintiff's atty R. E. Hickman and H. E. Morgan

Defendant's atty Roy E. Martin State's atty.

Hon. P. J. Hill Trial judge

BARRY, J.

Plaintiff was found guilty of having unlawfully transported intoxicating liquor and was fined $200.00 and costs. His sole contention in this court is that the evidence is insufficient to sustain the verdict. The evidence in his behalf is to the effect that he and his brother Angelo were partners engaged in the wholesaling of non-intoxicating liquors at Christopher, Illinois, and that they made deliveries thereof by trucks or wagons at Zeigler, Ill., and other points; that on the morning of March 24, 1924 the two brothers and a Mr. Perino loaded two wagons at Christopher with non-intoxicants to be driven to Zeigler and there delivered to their customers; that Angelo drove one of the wagons and Perino the other; that plaintiff went to Zeigler on the train and there called on customers so as to procure orders for the next day; that having procured such orders he went to the outskirts of the village to meet Angelo; that when he met Angelo he got upon the wagon to give Angelo the orders for the next day and that Angelo then told him he had some whiskey on the wagon; that he told Angelo that was

no way to do and that he would not ride with him to the station; that the officers came up and searched the wagon after he had gotten off and found the whiskey. The wagon and the non-intoxicants were the property of plaintiff and his brother, but plaintiff denied all knowledge of the whiskey until he had gotten upon the wagon and was told by his brother. He denied that he was in any way interested in the whiskey.

Plaintiff was corroborated by Perino and Angelo as to the loading of the wagons with non-intoxicants and that no intoxicating liquors were loaded on the wagons at Christopher. Angelo testified that when he was about a mile from Zeigler he met a man on the road who had a breakdown and the man asked him to haul the whiskey to Zeigler for him. He did not know the man's name, but he and the man put the liquor on the wagon and that plaintiff knew nothing about the liquor until he got upon the wagon at the outskirts of the village.

Plaintiff testified that the roads were muddy and for that reason they used wagons instead of trucks; that when this wagon was loaded it was loaded nearly even; that he intended to take the next train back to Christopher after he delivered the orders to Angelo. Angelo testified that the wagon was not loaded completely full; that there was some space, more in front than in the back.

The police officers of Zeigler had a search warrant directing them to search the wagon of plaintiff and his brother and were waiting on the outskirts of the village for the approach of the wagon. They saw the plaintiff out there and saw him get on the wagon. Presumably he saw the officers. Officer Coots says that he stopped the wagon after the plaintiff had ridden about two blocks and that plaintiff then got off the wagon. The officer says that he then told plaintiff he had a search warrant for his wagon and that plaintiff said he didn't know

whose wagon it was. Three other witnesses say that plaintiff told them he didn't know whose wagon it was. One witness testified that plaintiff told him that he didn't know his brother who was driving the wagon.

The officers found a large quantity of whiskey on the wagon nearly all of which was in the front end thereof. There were 8 five gallon containers; one 3 gallon jug; two 2 gallon jugs and one five gallon jug, making 52 gallons of liquor. The containers were in soda cases and beer cases.

It is not strange that the jury refused to believe plaintiff, his brother and Perino. Plaintiff says the wagon was loaded nearly even. The officers say that the cases containing the whiskey were nearly all in the front end of the wagon, in two tiers tapering from the front to the back. Plaintiff knew that the wagon belonged to him and his brother and yet four witnesses say that he said he didn't know whose it was. Why should he say that if he were innocent? And why should he say he did not know his own brother? Why was it necessary for him to go out and meet his brother to give him the orders for the next day when he was going back to Christopher on the next train and the orders would have to be filled at Christopher? The jury might very well conclude that plaintiff saw the officers before he got upon the wagon at Zeigler and that this was the reason he appeared to be incensed at his brother for having the whiskey on the wagon.

In view of the evidence and the reasonable inferences to be drawn therefrom we would not be warranted in interfering with the verdict on the ground that it is not supported by the evidence. The judgment is affirmed.

AFFIRMED.

NOT TO BE REPORTED IN FULL.

whose wagon it was. Three other witnesses say that plaintiff told them he didn't know whose wagon it was. One witness testified that plaintiff told him that he didn't know his brother-in-law was driving the wagon.

The officers found a large quantity of whiskey in the wagon nearly all of which was in the front end thereof. There are five gallon containers; one 3 gallon jug; two 2 gallon jugs and one five gallon jug, making 33 gallons of liquor. The containers were in sealed cases and beer cases.

It is not strange that the jury refused to believe plaintiff, his brother and Perkins. Doubtless then the wagon was loaded nearly even. The officers say that the cases containing the whiskey were nearly all in the front end of the wagon in two tiers lapping from the front to the back. Plaintiff knew that the wagon belonged to him and his brother and yet some witnesses say that he said he didn't know what it was. Why should he say that if he is an innocent? And why should he say he did not know his own brother? Why was it necessary for him to go out and send his brother to give him the orders for the next day when he was going back to Christopher on the next train and the orders would have to be filled at Christopher? The jury might very well conclude that plaintiff saw the officers before he came upon the wagon at Xalapa and that this was the reason he appears to be so concerned at his brother for having the whiskey on the wagon.

In view of the evidence, [illegible] we [illegible] to be given therefrom we would not be warranted in interfering with the verdict on the ground that it is not supported by the evidence. The judgment [illegible] affirmed.

AFFIRMED.

NOT TO BE REPORTED IN FULL.

H 204

236 I.A. 659

STATE OF ILLINOIS

# APPELLATE COURT

FOURTH DISTRICT

OCTOBER TERM, A. D. 1924

Term No. 45. Agenda No. 2.

J. N. Sloan,
*Appellee,*
vs.
J. E. Vail,
*Appellant.*

Appeal from Effingham Circuit Court.

OPINION BY BARRY, J.

Appellee loaned John Rentfrow $2075.00 for one year on a judgment note dated Sept. 21, 1920, purporting to be executed by the borrower and certain of his relatives including appellant who is his father-in-law. About the time the note came due said Rentfrow delivered to appellee another note for $2500.00 purporting to bear the signatures of the same parties and which included the amount of the first note and an additional loan. When the $2500.00 note came due appellee procured a judgment by confession. Appellant presented to the court his motion and affidavit to the effect that as to him the note was a forgery. Thereupon the judgment was opened with leave to plead. By leave of court appellee filed an additional count based upon the $2075.00 note. Appellant filed a verified plea of non-assumpsit and there was a verdict and judgment in favor of appellee for $2431.67.

The defense was forgery and the burden of proof was upon appellee. He made no showing as to the signature on the $2500.00 note and the court sustained an objection to its introduction in evidence. The verdict and

judgment are based solely on the first note. Appellant contends that appellee failed to prove that he signed the note, or that he ratified and adopted it with full knowledge of the facts. We will first consider the evidence tending to support appellee's cause of action. About ten days before the $2500.00 note came due John Rentfrow asked appellee to take a new note therefor and to make him an additional loan of $300.00. At that time appellee and appellant had never met. Appellee went to appellant's home and told him that he had a $2500.00 note against John Rentfrow on which appellant was surety and that Rentfrow wanted to renew the note and borrow more money. Appellant admits that he then said to appellee that he didn't think the note was that large, that he thought it was about $2,000.00.

Appellee testified that appellant said, in that same conversation, that it looked like he would have to pay that note some day and if he did he would take it out of Mrs. Rentfrow's share of his estate. He also says that appellant then stated that he would sign again for what he had already signed but no more. A few days later the parties met at Beecher City and had a conversation in the presence of F. M. Lechner and W. L. Smith. Appellee says that appellant then asked him if Rentfrow had been around yet to fix up that note and upon being informed that he had appellant said he would fix up what he was on but no more. There was then some talk about notes held by other parties and appellant denied having signed them. Appellee says that he then said to appellant "You are disputing their notes but what about mine?" and that appellant replied: "I signed your first note, but I have no recollection of the others. I am a man of my word. I will make your note good." Appellee says he then said to appellant— "What will I do about those other notes if he (Rentfrow) brings them

around?'' and that appellant replied: ''You hold them until you see me.'' As to the material part of that conversation at Beecher City appellee is fully corroborated by Lechner and Smith.

Appellee testified that a few days later he and Mr. Lechner went to appellant's farm and found him out in the field. Appellee says that while he went over into the field Lechner remained on the road. Appellee says that he told appellant that Rentfrow had brought the notes signed up; that appellant said he didn't sign them; that appellant asked if he was going to do anything about the notes for a few days and that he replied: ''No, not if you will fix them up.'' That appellant then said: ''Give me a few days and I will fix it all up with you.'' Appellee says that he and appellant walked over to the road and appellant again said, in the presence of Lechner, that if they would give him a few days until he could see John's folks he would make their notes good. In this appellee was corroborated by Lechner.

Appellee testified that on Sept. 26, 1922 he again went to see appellant. He says that appellant then told him that he was about sick about the note and when he finally asked him what he was going to do about it appellant replied that he couldn't fix up one without fixing all. On the day before this conversation appellant conveyed his farm to his wife in consideration of one dollar and love and affection. Mr. Engle, a lumber dealer at Beecher City, testified that appellant came in to buy some lumber and in speaking of the Sloan notes appellant said he signed the first note but not the rest. Mrs. Lawrence, a sister of John Rentfrow, testified that in Sept. 1922 she heard appellant say that appellee was after him to pay a note of a little more than $2,000.00 and that she said to him: ''You never signed such a note for John?'' and that appellant replied: ''Yes, but I thought it was

[illegible] and that appellant replied: "You bet! Dig until you see me." As to the material part of that conversation at Hoolper City appellee is fully corroborated by Lechner and Smith.

Appellee testified that a few days later he and Mr. Lechner went to appellant's farm and found him out in the field. Appellee says that while he went [illegible] him the field Lechner remained on the road. Appellee says that he told appellant that Lechner had brought the money signed up; that appellant said he didn't care [illegible] that appellant asked [illegible] he was going to go right ahead the notes for a few days and that he replied: "No, not if you will fix them up." That appellant then said: "Wait a few days and [illegible] will fix it all up." [illegible] Appellee says that Lechner [illegible] appellant walked over to the road and appellant again said, in the presence of Lechner, that if they would give him a few days [illegible] would be [illegible] Lechner's [illegible] would make their notes good. In this appellee was corroborated by Lechner.

Appellee testified that on Sept. 26, 1922, he again went to see appellant. He says that appellant then told him that he was about sick about the notes and when he finally asked him what he was going to do about it appellant replied that he couldn't fix up one without doing all. On the day before this [illegible] appellant conveyed his farm to his wife in consideration of love and affection. Mr. Hughes, [illegible] of Brooker City, testified that appellant came in to his [illegible] number and in speaking of the Sloan notes appellant said he signed the first note but the rest [illegible]. Mrs. Lawrence, a sister of Jane Brontrey, testified that in Sept. 1922 she heard appellant say that appellee was after him to pay a note of a little more than $2,000.00 and that [illegible] said to him: "You [illegible] signed such a note for [illegible]" and that appellant replied: "Yes, but I thought it was

paid." A bank president testified that he had known appellant for ten years and was familiar with his signature and that in his opinion appellant signed the note for $2075.00.

It is apparent, therefore, that appellee produced ample evidence to warrant the jury in finding a verdict in his favor. Appellant contradicted the testimony of appellee, Lechner, Smith, Engle and Mrs. Lawrence. The testimony of Mrs. Lawrence was also contradicted to a certain extent by that of appellant's daughter and her husband. While appellant testified that he did not sign the note he did not say that he had not authorized any person to sign his name thereto. Forgery was not established by proof that appellant did not sign the note. The cashier of a bank of which appellant was a customer, testified that he didn't think it was appellant's signature. Two cashiers of other banks testified from a comparison of signatures they were of the opinion he did not sign the note. A bank president testified that from comparison of the signatures the similarity was enough that he would take it for an ordinary amount. Another witness who had transacted business with appellant and knew his signature said he didn't believe it was appellant's signature on the note.

Both sides, by their instructions, tried the case on the theory that there was sufficient evidence to make the question of ratification and adoption one of fact to be determined by the jury. There was no suggestion in any instruction that there could be no ratification and adoption in the absence of such evidence as would raise an estoppel in pais. We cannot consider questions that were not raised in the trial count.

Appellant contends that appellee's first and fourth instructions are erroneous because they did not require the jury to find that appellant ratified the signature with

[illegible]

pellant for [illegible] years and a day, together with his [illegible] and that in his opinion [illegible] which signed the note for $2075.00.

It is apparent, therefore, that [illegible] ple evidence to warrant the jury [illegible] his favor. Appellant cites [illegible] police inspector, Smith, Hugh and [illegible] testimony. The testimony of Mrs. Lawrence was also contradicted in a certain extent by that of appellant's [illegible] husband. While appellant testified that he did not sign the note, he did not say that he had not [illegible] authorized any person to sign his name thereto. Inspector Smith testified [illegible] appellant did not sign the note. [illegible] signature of a bank of which appellant was a customer, testified that in only [illegible] instances appellant's signature was [illegible]. Two witnesses of other banks testified [illegible] comparison of signatures here were on the subpoena by [illegible] the note. A bank president testified that from comparison of the signatures, the signature was probably that he would take in [illegible] business. Another witness who had transacted business with appellant and knew his signature said he didn't believe it was appellant's signature on the note.

Both sides, by their and reasons, tried the case on the theory that there was sufficient evidence to raise a question of ratification and adoption one of [illegible] determined by the jury. There was no exception in the instruction that there could be no ratification and [illegible] tion in the absence of such evidence as a [illegible] adopted in part. We cannot consider specifications that were not raised in the trial court.

Appellant [illegible] that appellee's first and fourth instructions [illegible] erroneous because they did not require the jury to find that appellant affixed the signature. [illegible]

full knowledge of all the material facts affecting his rights. The first required the jury to find that there was a ratification as defined in the instructions. The fourth simply informed the jury that an unauthorized signature to a note becomes binding upon a subsequent ratification by the party whose name appears on the note as a maker. By appellee's fifth and appellant's sixth instructions the court advised the jury as to the meaning of ratification. Neither of them required "full knowledge of all the material facts affecting appellant's rights." The vice, if any, is common to both sides and neither can complain.

It is argued that the court erred in giving appellee's second instruction which informed the jury that if appellant signed either of the notes sued on then they should find in favor of appellee for the amount of that note. It is strange that the court should direct the attention of the jury to the $2500.00 note which was not admitted in evidence, but we again find that appellant's first given instruction was in regard to the same note and left it to the jury to say whether it was signed by appellant. The jury found in favor of appellee on the other note which was the only one before them. The jury was not mislead and there was no reversible error in the giving of appellee's second instruction.

It is argued that appellee's fifth instruction did not give the jury a correct definition of "ratification". That it omitted the element of "full knowledge of all the essential facts affecting appellant's rights." Appellant's sixth given instruction did not contain that element although it defined the same word. We see no material difference between the two instructions. Appellant is in no position to complain. The court did not err in refusing appellant's seventh instruction. It had reference to the $2500.00 note which was not before the jury

full knowledge of all the material facts affecting his rights. The jury required the jury to find that there was a notification as defined in the instructions. The jury simply by [illegible] the jury, and [illegible] stipulation to a sole lessee [illegible] [illegible] authorized by [illegible] [illegible] [illegible] [illegible] instructions the court refused the jury [illegible]

[illegible] Section. [illegible] of [illegible] judge of [illegible] [illegible] [illegible] [illegible]

It is proved in the court below to prove [illegible] [illegible] [illegible] [illegible]

and was substantially the same as his first given instruction.

It is argued that the court erred in refusing appellant's ninth and tenth instructions because they were the only instructions which correctly informed the jury as to what were the material facts of which appellant must have full knowledge before there could be a ratification. If appellant thought that these instructions were more favorable to him than his sixth given instruction he should not have requested the court to give his sixth instruction. If a party tenders two or more instructions on the same subject he can not complain if the court does not give the one he deems most favorable.

It will be observed that the burden of the complaint in regard to the instructions has reference to the question of ratification and adoption. In view of the entire evidence that question is of but little importance and whether the instructions with reference thereto are correct is not material. Appellant admitted on the witness stand, that when appellee first spoke to him about having the note of John Rentfrow for $2500.00 and that appellant was surety thereon, he said to appellee that he thought the note was only about $2000.00. This was a clear recognition of the fact that he had signed a note for about that amount. From that and all the other evidence in the case we are of the opinion that the jury acting reasonably could have reached no other conclusion than that appellee had signed the note in question. Had the jury found otherwise we would be required to set aside the verdict. Finding no reversible error in the record the judgment is affirmed.

AFFIRMED.

NOT TO BE REPORTED IN FULL.

4205

Term No.4.

Agenda No.14

236 I.A. 659

In The

APPELLATE COURT OF ILLINOIS.

Fourth District.

OCTOBER TERM, A. D. 1924.

| | | |
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| George M.Quick, Appellee. | ) | |
| vs | ) | Appeal from the |
| S.M.Hester, Fred Hester, Pearl Hester, and Walter Hester, Appellants. | ) | Circuit Court of Clinton County. |

Opinion by Boggs, J.

An action in tresspass was brought by appellee against appellants in the Circuit Court of Clinton County to recover for injuries alleged to have resulted from an assualt by appellants upon appellee. The Declaration consists of four counts, and in effect charges appellants with having assualted and beaten appelllee on or about March 1st. 1922. To said declaration appellants filed a plea of the general issue and two special pleas, the first special plea being a plea of son assualt demesne, and the second a plea of molliter manus imposuit. To said special plea appellee replied de injuria. A trial was had, resulting in a verdict and judgment in favor of appellee for $1,000.00. To reverse said judgment, this appeal is prosecuted.

The record discloses that, some time prior to March 1st. 1922, appellant S.M.Hester, who is the father of the other appellants herein purchased from appellee, who was then in straighened circumstances, his farm located in said county. In the deed conveying said premises, appellee reserved the right to remove

certain hedge posts therefrom. Both parties offered oral testimony, without objection, as to what was said at the time of said sale with reference to the reservation of said posts. The evidence discloses that certain posts had been set, that is, had been placed in the ground and the dirt tamped around them; other posts had been placed in holes dug in the ground, but had not been tamped in place; and still other posts were placed in piles on said premises. It is claimed on the part of appellants that the only posts to be removed by appellee were the posts that were piled, whereas appellee was ~~the~~ claiming the right to remove the posts that had been placed in the ground but whuch had not been strung with wire.

On or about March 1st, 1922, appellant S.M.Hester received information from some of his neighbors to the effect that appellee was removing the posts that had been set in the ground. Appellant S.M.Hester, with his sons, the other appellants herein, drove down to appellee's residence in a two-seated spring wagon, and as they approached the same appellee came out, riding on a sled, there being a light snow on the ground. It is contended by appellants that when appellee saw them he whipped up his team; that upon his failure to stop when appellants called to him, they drove diagonally across a field andheaded appellee off.

The undisputed evidence is that when they reached appellee, appellant Fred Hester got out of the wagon and ran around in front of appellee's team. From this point on, the evidence is conflicting. Appellee testified that all of appellants got out of the wagon and assaulted him; that "they come right after me, all four of them, one after the other as fast as they could get out of the rig. I told them to stand back; I could not fight all of them. I just said "Stand back, fellows," and went off the sled. They went after me up against the wire fence about 12 or 15 feet from the sled, all four of them.....Fred got hold of me first, then S.M.Hester, then Walter Hester; they beat me with their fists and kicked me. Fred struck me first; they were all beating me. They hit and kicked

me;they struck me on the face and on the head,and kicked me in the legs and ribs,most all over the body. They had hold of me when they did all of this kicking."

On the other hand,the testimony of appellants tends to show that when Fred Hester went to the head of appellee's team,appellee jumped off the sled and started toward him with an ax raised as if to strike him;that appellants S.M.Hester and Walter Hester went to the rescue,grabbed appellee and attempted to take the ax from him so that he would not injure them. Appellants admitted having struck appellee one or more blows,but stated that it was in order to keep him from injuring them with the ax.

After this occurence,appellants went to the state's attorney's office and undertook to tell him what had occured,and in effect requested that complaints be lodged against them for assaulting appellee. This was finally done,and they entered pleas of guilty and were fined therefor.

It is first urged on the part of appellants for a reversal of this cause that the trial court erred in unduly limiting the cross-examination of appellee. Said cross-examination was with reference to the posts in question,and as to how many there were and what was done with them,etc. As the posts in question were only incidentially involved,we are of the opinion that the court committed no reversible error in so limiting the examination.

It is also contended that the court erred in admitting an X-ray photograph of appellee,taken for the purpose of disclosing the condition of the joint where the hip bone attaches to the spinal column. The evidence tends to show that the person taking the X-ray picture was duly qualified to take the same and to give evidence in connection therewith. It was also contended in this connection that inasmuch as no flouroscopic view was taken,that the witness would not be qualified to testify as to whether or not the X-ray picture correctly showed the condition it purported to.

No authorities were cited by appellants in support of this contention, and we are of the opinion that the X-ray picture was admissable, Dr. Warren, who took the same, having testified that it correctly showed the condition it purported to, and it was not necessary for him to first make a fluoroscopic examination in order to so detirmine. The court did not err in admitting this photograph. Stevens vs Illinois Central R.R?Co. 306 Ill. 370 - 375.

It is also contended that the court erred in permitting testimony as to the financial worth of the appellants. The evidence also tended to show that appellant S.M.Hester was worth something like $50,000.00, and his sons about $10,000.00 each, and it is contended that it would be unfair and prejudicial to the appellants who were worth only $10,000.00 to have evidence given with reference to the financial condition and worth of S.M.Hester. This testimony was objected to on the trial, but not for the same reasons here urged, the objection being a general one. As the law warrants testimony of this character where exemplary damages are claimed, and as the objection was made a general one, we hold that the appellants are not in a position to urge in this court an objection that they did not make in the court below. Dacy v. Gall, 242 Ill. 606; Morev v. Brown, 305 Ill. 284-286.

It is next contended by appellants that the verdict of the jury is against the manifest weight of the evidence. In support of this contention, counsel for appellants call attention to the fact that appellee was the only witness on his behalf as to the alleged assualt, and that the material parts of his testimony are directly disputed by all of the appellants, being four in number.

So far as the direct testimony with reference to the alleged assault is concerned, the contention of counsel for appellants is correct, and their contention being that whatever injury they inflicted upon appellee was for the purpose of defending themselves from injury threatened by appellee with the ax,

as above stated. However, the jury had the right to consider the fact that appellants, immediately following the alleged assault, procured an information or complaint to be filed against them, to which they pleaded guilty. In addition to this, the witness Murray, who was the state's attorney referred to, testified that he suggested that appellee might be liable to arrest for having assaulted appellants, but that appellants did not seem to desire to have this done. There is also testimony in the record to the effect that appellants Walter Hester and Pearl Hester stated to William Smith, a witness on behalf of appellee, a day or so after the assault, that "we (referring to the appellants) didn't give him (referring to appellee) half of what he deserved. We got a chance to beat his face, and didn't give him one-half of what he needed." Two witnesses on behalf of appellee testified to having heard appellee screaming, on the morning of the alleged assault, and one of them testified that shortly thereafter he saw appellee, and that at that time he was badly bruised, that his face was bloody and one of his eyes practically swollen shut, These witnesses also testified that they examined the ground where the assualt is alleged to have occured, and found tracks going to the sled, and also found tracks going back from the sled to the wire fence, as testified to by appellee.

Without a further discussion of the evidence, we are satisfied that the record discloses that the verdict is not against the manifest weight of the evidence. We would therefore not be warranted in reversing the case on that ground.

It is next contended by appellants that the court erred in giving the first, second, fourth and seventh instructions given on behalf of appellee.

It is insisted that appellee's first given instruction is erroneous for the alleged reason that it informs the jury that the number of witnesses is not to be taken into consideration in detirmining the weight of the evidence.

Counsel cite a number of cases in support of this contention. An examination of the instruction discloses that the court was not undertaking to tell the jury how the preponderance of evidence was made up, or what constitutes such preponderance. This instruction does not come within the rule laid down in the cases cited by counsel, and while we do not approve of the instructions we hold there was no reversible error in giving the same.

It is insisted that appellee's second given instruction is erroneous bevause it does not confine the jury to the evidence in the case. This instruction lays down a general proposition. It did not direct a verdict, and in our judgment it stated a correct principal of law, and the court did not err in giving the same. Appellants' third given instruction is of the same character. They are therefore in no situation to complain of the giving of this instruction on behalf of appellee.

Complaint is made of appellee's fourth given instruction for the reason that it does not limit the jury to the damages charged in the declaration. The verdict of the jury was for $1,000.00, whereas the damages claimed was $15,000.00. We do not think that it can be reasonably contended that appellants were prejudiced by the giving of this instruction, even though it be conceded that as a general proposition instructions on the measure of damages should be so limited. There was no reversible error in the giving of this instruction.

The same complaint is made as to appellee's seventh given instruction. What we have already said in connection with appellee's fourth instruction disposes of this assignment of error.

It is also contended that instruction number 7 did not confine the jury to the assualt alleged in the declaration. An examination of the same satisfies us that the jury could not possibly have been misled as to the assault complained of, by the giving of this instruction. In this connection we might say that appellants' fourth and fifth given instructions are of the same

character in this respect,so they are in no position to complain of the ruling of the court in this connection.

Instruction number 7 on behalf of the appellee authorized the jury to find exemplary damages"if the jury believed that justice and the public good required it." Counsel do not contend that an instruction of this character is not good in certain cases, but insists that in this particular case it was not warranted by the evidence. From the evidence already referred to,we are of the opinion that rhere was ample evidence in the record,if the jury believed it,to warrant them in returning a verdict awarding exemplary damages. It might be observed in this connection that if the jury considered the evidence tending to show a permanent injury to the hip of appellee,as disclosed by the X-ray picture offered in evidence,it would not necessarily follow that the jury gave exemplary damages,as they could easily have found that the actual damages sustained were as much as the verdict.

It is also contended by appellants that the court erred in permitting the witness Hugh V.Murray to testify on behalf of appellee,for the reason that he was the state's attorney to whom appellants went at the time of the alleged assault,and to whom appellants had related their version of the transaction in question. This objection was not made in the trial court,the only objection made to his testifying at that time being that he was an attorney of record in the trial court,and had withdrawn from the case for the purpose of testifying. Murray testified that he had nothing to do with the civil suit,that he did not know that his name had been entered as attorney of record in the case, and that he had withdrawn as such attorney some two or three days prior to his testifying in the case. Even though he had withdrawn as counsel for the purpose of taking the stand,as contended by appellants,while such action is not to be commended,at the same time his testimony was competent,its weight being for the

jury. Wilkinson v. People, 226 Ill. 135;Grindle v. Grindle,240 Ill.143;Wetzel v. Firebaugh,251 Ill.190;Eshelman v. Rowalt,298 Ill.192. We are therefore of the opinion and hold that the court did not err in permitting this witness to testify.

Lastly,it may be observed that appellants were seeking to justify their actions on the ground that they were defending their property --viz.,the posts in controversy. The record,however discloses that appellant S.M.Hester had not yet taken possession of the farm purchased from appellee. So the principal of law relied on by appellants in this connection would not apply.

Finding no reversible error in the record,the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

Term No.8. Agenda NO.40.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

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OCTOBER TERM A.D.1924.

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|---|---|
| THE PEOPLE of the STATE of ILLINOIS. Defendant in Error. vs MATTIE KNIGHT, Plaintiff in Error. | Writ of Error to Perry County Court. |

Opinion by Higbee,P.J.

Plaintiff in error was found guilty upon an information charging her with unlawfully keeping a place for the practice of prostitution in the county Court of Perry County and was adjudged to pay a fine of $200.00.

The record shows that Fay Ikus,a state Vice Inspector of the Department of Health and Hygiene of this state,in company with one Scott Walters,went to the home of plaintiff in error in Duquoin about 8:30 or 9:00 o'clock in the evening of July 21, 1923. Ikus testified that after entering the house plaintiff in error turned out the "lights and stated that she did so because the police were outside;that a man named Lingle went to the house with him and Walters;that Lingle and a young woman designated as Pauline soon left the room and went into a bedroom off the hall;that plaintiff in error asked Mr.Walters"if he didnt want to go to bed"and that he refused:that in about ten or fifteen minutes Lingle and Pauline came out of the room,and that as they

came out the girl was fastening her dress and Lingle was adjusting his tie,and that they all then left stating they would probably return about eleven o'clock.

Scott Walters corroborated the witness Ikus in all respects. This was all the evidence in behalf of the People. Plaintiff in error placed a witness on the stand who testified that he had boarded at her place for about five months before this time and during that time he did not see any acts of prostitution. Two other witnesses testified in behalf of plaintiff in error that they lived near her place,and that they had never seen men frequenting her home. This is substantially all the testimony in the case.

Plaintiff in error entered a motion for a new trial,assigning as one of the grounds newly discovered evidence. In support of this motion she filed the affidavit of Clarence Lingle stating that he had been informed his name had been used by Ikus and Walters in connection with said prosecution and that he did not know the witnesses Fay Ikus and Scott Walters and never saw them;that he did not accompany them to the house of plaintiff in error on the day in question or at any other time;that he did not know plaintiff in error and was never in her home.

The State's Attorney has not aided us with a brief or argument in this case and the judgment could under Rule 27 of this court be reversed pro forma but we have examined the record and concluded it should be reversed on the merits. While the affidavit of Lingle fails to show that his evidence was discovered by plaintiff in error since the trial and further fails to show what diligence she used to secure the same,yet it was so material that under the unsatisfactory nature of the proof in this case,the motion for a new trial should have been sustained in order that such testimony might be submitted on the trial.

It is contended by plaintiff in error that the evidence

does not support the verdict and judgment and this raises a serious question. It is true that the evidence discloses very suspicious circumstances. However there is no direct evidence of any acts of prostitution nor any evidence that men or persons of evil reputation frequented the home of plaintiff in error. She was found guilty of keeping a place for the practice of prostitution. A place for the practice of prostitution has been defined by the Supreme Court of this state as "a house where women prostitute themselves by offering their bodies to indiscriminate intercourse with men." (People v. Wright,277 Ill.521). The gist of the offense is the keeping and using of the house for the purpose of prostitution and lewdness. People v. Ryberg,287 Ill.195. People v. True opinion filed at this term by the court. We are of the opinion that the evidence in this case does not show beyond a reasonable doubt that plaintiff in error was guilty of the offense of which she was adjudged to be guilty.

The judgment is reversed and the cause remanded.

Reversed and Remanded.

Not to be reported.

TERM NO.12. 236 I.A. 660 AG.NO.7.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM A. D. 1924.

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| THE GALLATIN FARM BUREAU, a Corporation. Appellee. | ) | |
| vs | ) | Appeal From COUNTY COURT of |
| WILLIAM OZEE, Appellant. | ) | GALLATIN COUNTY. |

OPINION BY HIGBEE, P.J.

The Gallatin Farm Bureau, appellee, brought suit before a Justice of the Peace, against William Ozee, appellant upon the following promissory note.

"Saline Mines, Illinois, April 15th 1921. No.29.

On July 1, 1921, I promise to pay to the Gallatin County Farm Bureau or order fifteen dollars, in payment of membership dues in said Farm Bureau and the Illinois Agricultural Association, for the period ending July 1, 1922. The National Bank of Shawneetown, Ill. is hereby auth rized and directed to pay above sum at maturity or thereafter and to charge same to my account.

William Ozee (Seal)

Two cents revenue stamp canceled April 15,1921,W.C."

From a judgment against him appellant appealed the case to the county Court of Gallatin County. At the close of all the evidence in that court appellant moved the court to give the jury a preemptory instruction to find the issues for him. The Court denied this motion and refused to give the instruction. Appellee then filed a motion for a preemptory instruction directing the jury to find the issues for it and assess its damages at the sum of $17.06. The Court gave this instruction and the verdict was returned accordingly. From the judgment entered on that verdict after a motion for new trial was overruled this appeal has been perfected.

Appellant first urges as a ground for reversing this judgment that the motion to direct a verdict in his favor should have been given for the reason that the evidence at that stage of the trial disclosed that the plaintiff had not at the time the note was executed been incorporated,and that it was therefore a partnership of which appellant was a member,and that consequently this suit could not be maintained. It appears from the evidence that the Gallatin County Farm Bureau,appellant herein, had not on April 15,1921,the date of the note,been incorporated,but that a short time thereafter,as soon as sufficient number of members had been obtained it was duly incorporated. It further appears that appellant had dealt with appellee as though it were a corporation. Having recognized and dealt with appellee as a corporation appellant cannot,even though appellee was not actually incorporated at the time the note was given,now avail himself of that fact as a defense to a suit upon this note which he admitted signing and executing. Brown v. Melich,185 Ill

App. 3; Clinton Company v. Schwartz 175 Ill.App. 577. It was not therefore error for the trial court to deny his motion for a preemptory instruction.

It is next contended that the court erred in refusing to admit on behalf of appellant a membership agreement and a receipt for the same which appellant contends was a part of the same transaction in which the note was given. It is undoubtedly the wellestablished law that where a note and a written contract bear the same date, and are executed at the same time and pertain to the same subject matter that they are parts of one transaction and they must be construed as one instrument. However this membership agreement was signed "William Ozee and Son" and the receipt for the same given by appellee ran to "William Ozee and Son". In the absence of competent evidence explaining this discrepancy and definitely connecting the membership agreement and receipt with the execution of the note and as being a part of the same transaction the Court properly refused to admit the same in evidence.

Appellant did not deny the execution of the note nor claim that the same was paid. There was no evidence to meet the prima facie case made by the introduction of the note in evidence and proof of its nonpayment. The amount thereon was a mere matter of computation. It was therefore not error for the trial court to direct a verdict in favor of appellee and the judgment is accordingly affirmed.

AFFIRMED.

not to be reported.

H 2080

Term No. 22.

Agenda No. 37.

IN THE

APPELLATE COURT OF ILLINOIS, 236 I.A. 660

Fourth District.

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OCTOBER TERM, A.D. 1924.

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| JOHN L. TARRANT, Appellee. vs. GRAND LODGE BROTHERHOOD OF RAILROAD TRAINMEN, Appellant. | Appeal from Circuit Court, St. Clair County. |

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OPINION by HIGBEE, P.J.

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This suit is based upon a benefit certificate issued by appellant to appellee, and is brought to recover indemnity for injuries received by appellee on November 25, 1923. Judgment was recovered for $1620.00. To the declaration appellant filed the general issue and five special pleas. The first special plea set out section II of the Constitution and general rules of the order to the effect that any member inciting an unauthorized strike or participating therein, should upon conviction be expelled, and that on account of participating in such an unauthorized strike on April 8, 1920, appellee had been expelled from the order and from local Lodge Number 901 of which he was then a member. The second plea alleged that appellee did not present proofs of his alleged injury as required by the constitution and by-laws of the order. The third averred that appellee had not paid his dues and assessments as provided by the general rules and constitution of appellant and that by reason thereof he had been dropped and expelled from the order. The fourth alleged that appellee had surrendered the certificate issued to

him in the month of June,1918. The fifth special plea stated that the benefit certificate sued on was not in force at the time of appellee's alleged injury; and that on March8,1923 in making application to be reinstated as a member of the order appellee stated that he had formerly belonged to Lodge Number 901, prior to but not since 1920.

This case is substantially like the case of Hatch,v. Grand Lodge Brotherhood of Railroad Trainmen, this appellant, in which we filed an opinion July 7,1924, and the case of Wardlow, vs Grand Lodge Brotherhood of Railroad Trainmen, the same decided by us in an opinion handed down March 10, 1924. No question is raised in this case that was not passed upon and decided in one or the other of the above mentioned cases, save possibly the one contention made here that the court erred in not permitting officers of appellant to testify that the charter fo the local Lodge to which appellee belonged had been revoked because members of that Lodge had participated in an unauthorized strike. In Wardlow v. Grand Lodge,Supra, we held that it was not only necessary for appellant to prove that appellee had been expelled in a regular manner, but that such fact must be proved by the records. Under the authorities cited by us in that case the burden was also upon appellant to prove that such revocation, if made, was made in compliance with the constitution and should be shown by appellant's records. Oral testimony to that effect was properly refused.

The rules laid down in the opinions in the two cases above referred to must control here, and the judgment is therefore affirmed.

AFFIRMED.

Not to be reported.

4 30 1

# 236 I.A. 660

Term No. 23. Agenda No.52

IN THE

APPELLATE COURT OF ILLINOIS,

Fourth District.

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OCTOBER TERM, A.D. 1924.

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| HARRIET HORNER SMITH, Appellee. VS. ULYSSES G. GRUNDON and EMMA T. GRUNDON, Appellants. | Appeal from Circuit Court, Wabash County |

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OPINION by Higbee, P.J.

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On August 25, 1914, Ulysses G. Grundon and Emma T. Grundon, appellants, executed to William M. Faribault their promissory note for $4500.00 due three years after date with interest at the rete of eight per cent per annum, and to secure the payment of same executed a trust deed on certain real estate. This note was endorsed in blank by Faribault as follows: "Without recourse on me, Wm. M. Faribault." Mary H. Lucas died July 29, 1917 in the state of Wisconsin and her will was admitted to probate in that state. Letters testamentary were taken out in the probate court of St.Louis on September 25, 1917 and William R. Faribault and Fred G. Zeibig were appointed as executors of her estate. The above mentioned note, being the one involved in this case, was inventoried by those executors among the assets of her estate. Default having been made in the payment of the note and interest the property was sold under a trust deed for $3000.00 and after the payment of the costs and accrued interest a balance of $2611.86 remained which was applied on the principal of the note. The said executors brought suit

against these appellants in the circuit court of Wabash County to the November term, 1919 to recover the balance remaining unpaid on the note. Judgment was rendered for appellants in that suit and the executors appealed to this court, which reversed that judgment and remanded the cause. (Faribault v. Grundon, 221 App. 534.) While that action was pending, the probate court of St.Louis on December 20, 1919, entered what is termed a "final settlement and distribution" order in the estate of Mary H. Lucas. This order, after finding that all the special bequests and the legacies had been paid directed, that upon payment to the executors of $157. 24 they should "distribute, assign transfer and deliver the above described notes and stock composing the balance found in their hands" and which included the note here in question as follows. To Harriett Love Hoover Smith a two-thirds part thereof; To Warren Murdock Horner a one-sixth part and to John Scott Horner a one-sixth part. These executors were finally discharged by order of the probate court of St.Louis entered on December 5, 1921 and during all this time the note in question was among the files of the circuit court of Wabash County in the suit instituted by the executors. Upon the redocketing of that case in the circuit court it seems to have been abandoned and Howard P. French of MtCarmel who was then attorney for the executors, instituted a suit in behalf of appellee on the note to the November term 1922 of that court which was also dismissed. He again started a suit for appellee on the note in February, 1923 to the April term of that court, the note having remained in his possession all this time. It was forwarded by him, however, to Wisconsin to be used at the time appellee's deposition was taken in that state on June 7, 1923. There was introduced in evidence in behalf of appellee, an instrument signed by John Scott Horner and Warren M. Horner, under date of August 23, 1922, to the effec

that for the consideration of one dollar the signers did certify that Harriet Horner Smith was the owner of the note here in question. It further appears from the evidence in the record that appellee had purchased the interest of these two parties in the note.

To the declaration appellants filed a plea of the general issu, a verified plea denying that the note was assigned and delivered to appellee, and a further plea alleging that William M. Faribault the original payee of the note assigned and delivered the same to Mary H. Lucas, and that she then and there became the owner and legal holder of the same. This plea further set f forth the death of Mary H. Lucas, the probate of her will and the appointment and qualification of the executors in St.Louis; that the note was inventoried as a part of the assets of that estate, and that such executors then and there became the owners and legal holders of this note and so continued to be the owners and legal holders of the same at the time this suit was instituted.

In their argument attorneys for appellant state that the main question involved in this suit is "was there any assignment, endorsement or delivery of said note in question sufficient in law to enable the plaintiff to recover the balance due on the note and what is the proper situs of said note." It seems to be their contention that the verified plea aforesaid placed the burden upon appellees of proving a valid assignment of the note, and that without such proof the note could not be introduced in evi - dence. They further contend that the executors in Missouri, under the laws of that state, did not have the authority by virtue of their appointment to assign or transfer the note to appellee, and that as the note was not endorsed by Mary H. Lucas in her lifetime nor by her executors before the settlement of the estate, appellee cannot maintain an action at law in her individual name. for the reason that this note was endorsed in blank by William

M. Faribault, the original payee, it became payable to bearer. Section 9 of the Negotiable Instruments Act of this state in paragraph 5 expressly provides that a note, although originally payable to order, becomes payable to bearer whenever it is endorsed in blank by the payee or a subsequent endorsee. Section 34 of that act provides that an endorsement in blank specifies no endorsee and an instrument so endorsed is payable to bearer and may be negotiated by delivery. Under these two sections of the statute the note here in question was clearly payable to bearer. Section 30 of the Negotiable Instrument Act also provides that an instrument payable to bearer is negotiated by delivery. It follows that after the endorsement of this note by Faribault it required no further endorsement nor written assignment for its negotiation but it was fully and completely negotiable by delivery only. Even though the instrument executed by John Scott Horner and Warren M. Horner be considered as an attempted assignment of this note, yet that fact is not material here, for the reason that no written assignment or endorsement was necessary as the note was negotiable by delivery only.

It is not necessary for us to pass upon the question as to whether the verified plea placed the burden upon appellee to prove delivery of the note. The record shows that the probate court of St.Louis directed the note to be delivered to appellee and her brothers and that her brothers sold their interest to her. It was endorsed in blank and became a note payable to bearer. Howard P. French, who instituted this suit was her attorney and while it is true the note at that time was in the files of the circuit court of Wabash County yet it appears that Mr. French took actual possession of the note as her attorney. This was a delivery to her. She therefore became not only the owner of the note, but the holder thereof. Section 51

of the Negotiable Instrument Act provides that the holder of a negotiable instrument may sue thereon in his own name. Under these facts appellee had the right to maintain this suit in her own name and as no question is involved concerning the merits of the case the judgment will be affirmed.

AFFIRMED.

Not to be reported.

TERM NO.32. 236 I.A. 660 AG.NO.43.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

OCTOBER TERM A. D. 1924.

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| COMMERCIAL ACCEPTANCE TRUST, Appellant. vs W.E.STORCKMAN, Sheriff, Appellee. | Appeal from the Circuit Court of Wabash County. |

OPINION BY HIGBEE, P.J.

This is an action in replevin brought by the Commercial Acceptance Trust, appellant, v. W.E.Storckman, appellee, to recover the possession of a certain Hupmobile sedan. Appellee was sheriff of Wabash county. He had taken the automobile in question from one Howard Douglas under executions upon two judgments against Douglas. The declaration was in the usual form, alleging the wrongful taking and detention of the property. Appellee filed pleas denying the taking and detention, justifying under the executions and alleging property in Howard Douglas. A jury was waived and the trial had before the court. The issues were found for appellee and a writ of retorno habendo was awarded. From that judgment this appeal has been perfected.

In the latter part of 1923 the Weber Implement and Automobile Company of St.Louis, Missouri, was the distributor of the Hupmobile automobile for Wabash county and

other counties in that part of the State of Illinois. On December 11,1923,Howard Douglas made an agreement with that company to handle the Hupmobile automobiles at Mt. Cermel,Illinois. In making that arrangement the following instruments termed respectively,deposit agreement,trust receipt and time draft were executed.

Deposit agreement.

No.------ Dec.11,1923.

It is hereby agreed between the undersigned(Drawee - Distributor or Dealer) and Weber Instrument and automobile Co.(Shipper-Factory or Distributor)of St.Louis,Mo., hereinafter called the "Shipper"that the initial deposit of $395.63 placed by the undersigned with said shipper shall be applied against the purchase price of the Motor Vehicles covered by Trust Receipts of even date only upon final Release from Trust of said Motor Vehicles;and that this transaction is subject to the approval of Commercial Acceptance Trust at Chicago,Ill.,and unless so approved shall be null and void and the undersigned shall upon demand deliver said Motor Vehicles covered by said Trust Receipts to said Shipper, and in such case the above initial deposit shall be applied by said Shipper to such extent as may be necessary toward reimbursement for the expense of repossessing said Motor Vehicles or against any damage or loss to Shipper or the Commercial Acceptance Trust.

(singed) Howard Dogulas (Seal)
(Drawee-Distributor or Dealer.)

TRUST RECEIPT.

No.-------- St.Louis,Mo, Dec.11 1923.

Received of Weber Implement and Automobile Co., St.Louis,Mo.,acting for COMMERCIAL ACCEPTANCE TRUST,CHICAGO, ILL.,the owner thereof,One New Hupmobile Motor Vehicle,Model

Sedan,Serial No.129161,Motor No.129068,complete with all standard catalog attachments and equipment,in consideration whereof and of being permitted to drive said Motor Vehicle from above(Shipper's town and state to,and to display same in our regular place of business at Mt.Carmel, Ill.,and with liberty to use to exhibit and sell the same for their account for cash for not less than $1,125.00 we agree at our expense to store,warehouse and to hold said Motor Vehicle in trust for the holder of the Time Draft of even date herewith(which we have this day accepted)as their property and to return same on demand in good order and unused(except as provided above)and we further agree in case of sale as permitted above to keep the proceeds seperate from our funds and immediately pay over the proceeds to them without any expense or cost of whatsoever nature to the holder of said time draft. The acceptance of Time Draft equal in amount to the value of said Motor Vehicle shall not be effective to terminate this trust,but said draft and any sums delivered by us shall be security for the performance of the things obligatory upon us hereunder.

We further agree to keep a seperate account on our regular books of the motor vehicles delivered to us under this or any like receipt and any other motor vehicles that have been or may hereafter be delivered to us under the same form or similar form of receipt and of the proceeds thereof unsold,to report any sale to the holder of said time draft immediately after same is made,and further hereby agree to furnish to them on the first of each month a true and complete report for the preceeding month,which shall show the exact number of motor vehicles on hand held by us under this or similar receipts. We will also permit them or their duly accredited representatives or agents to

examine our books and inspect the cars in our possession at any time.

Commercial Acceptance Trust shall, during the entire time said car is held thereunder, keep said car insured against loss by fire and theft for not less than the wholesale price at the factory of said motor vehicle and provide for a surety bond, the risk under which is hereby agreed may be carried by the company for the accounting for the car or the proceeds thereof, to be effective in the event of our failure to redeliver said car on demand. We shall, until redelivery thereof, pay as damages for detention for each month or any part thereof after demand, 1% of said sale price.

We further agree to pay all costs, charges, expenses, disbursements, including reasonable attorney's fees (15% of sale price of car if permitted by law) should the holder thereof find it necessary to protect his property in said car by placing it in the hands of an attorney, and further that the waiver of any default shall not operate as a waiver of subsequent defaults, but all the rights hereunder shall continue notwithstanding any one or more waivers. We acknowledge receipt of true copy of this agreement.

(signed) Howard Douglas, Trustee.
(Dealers Signature.)

(On the margin is the following)

Property in Trust. The terms of this Trust Receipt are not subject to change by any one.

TIME DRAFT - ONE FOR EACH MOTOR VEHICLE.

St. Louis, Mo., Dec. 11, 1923.

(24 cts U.S. Rev. Documentary Stamps)

36110

On or before March 11, 1924, pay to the order of COMMERCIAL ACCEPTANCE TRUST, CHICAGO, ILL., if demand be made,

Eleven Hundred Twenty-five Dollars($1,125.00),as security for Acceptor's obligation under NEGOTIABLE TRUST RECEIPT bearing number hereof covering Hupp Sedan Motor Vehicle Serial No.129161,Motor No.129068,together with an attorney's fee of 15%(if permitted by law)should the holder thereof elect to require payment and place this draft in the hands of an attorney for collection. Demand,Protest,and notice of protest waived.

Value received and charge

To Howard Douglas.
(Drawee-Acceptor-Distributor or Dealer)

Mount Carmel,Ills.
(Town and State)
(Signed) Weber Implement & Automobile Co.
(Drawer - Shipper - Factory or Distributor)
(Written across the fact of exhibit)
Accepted.
Date,Dec. 11, 1923.
Payable at First National Bank
(Drawee - Acceptor's Local Bank.)
Mt.Carmel,Ills.
Payor Howard Douglas
(Drawee - Acceptor - Distributor or Dealer.)
(Endorsement on back)
For value received pay to the order of
Commercial Acceptance Trust,Chicago,Ill.,

We and each and all of the endorsers hereon,,jointly and severally guarantee payment of principal and interest after maturity at the highest legal contract rate,collection expenses,costs and attorney's fees,as and when the same shall become due,and of any extension or renewal of the within note in whole or in part,accepting all its provisions,authorizing the maker,without notice to us,to obtain and the holder hereof to grant extensions or renewals in whole or in part,waiving demand,protest and notice of protest and non-payment;also agreeing that in case of non-payment of principal or interest after maturity,when due, suit may be brought by the holder of this note against any one or more or all of us,at the option of said holder,wheth-

er or not such suit has been commenced against the maker, and that in any such suit, the maker may be joined with one or more or all of us at the option of the holder.

(Signed) Weber Implement & Automobile Co. (Seal)
Per. Geo. Weber, President.

Pay to the order of
First National Bank,
Mt. Carmel, Ill. For Collection.

Commercial Acceptance Trust.

Under these instruments the automobile in question was delivered to Douglas. On January 28, 1924, appellee levied two executions on the automobile while it was in the possession of Douglas. No question is raised as to the sufficiency of the judgments and executions. Appellant claims that it was at the time, the owner of the automobile. It is appellant's position that the transaction between Douglas and the Weber Company did not amount to a sale, but it is not clear as to just what it contends were the relations between these two parties. It is stated by appellant that Douglas was either the agent, factor or bailee, not for the Weber Company, but for appellant. Beyond doubt the three instruments executed by Douglas and the Weber Company do not amount to a chattel mortgage. Appellant cites a number of authorities to the effect that the title to merchandise delivered to a person for sale on "memorandum" does not pass to that person and is not subject to execution against him while in his hands. It, however, admits that this case is different in a number of particulars from the ordinary cases of trust receipts, chiefly in respect that there is no unconditional obligation in this case on the part of Douglas to pay the balance, and that in fact Douglas would only be obligated to pay the balance of the purchase price in the event he sold the car.

Appellee contends that the transaction amounted to a sale of the car to Douglas;that the instruments were but an attempt to retain a secret lien on the property and that the car was subject to the executions levied on it.

The automobile in question was in the actual and open possession of Douglas under conditions indicating that he was the owner thereof. He was possessed of a dealers license authorizing him to deal in this character of automobiles and had a place of business. None of the instruments were recorded. In fact the time draft had been endorsed to a bank for collection.

The true owner of the property may be estopped from asserting his ownership,if he permits another"to appear as the owner of or having full power of disposition over the property so that an innocent third person is led into dealing with an apparent owner". The estoppel does not depend upon where the actual title is,but rests upon the act of the real owner which precludes him from disputing the exsistence of a title which he has caused or allowed to appear to be vested in another. If a vendor of a chattel delivers it to a vendee or allows him to have possession of the chattel before payment of the purchase price and to have all the indicia of ownership,retaining,however, a secret lien for payment,he cannot assert his right against a judgment creditor of the vendee without notice before a levy is made." Drain v. LaGrange State Bank,303 Ill,330). In this case appellant and the Weber Company clearly permitted Douglas to have possession of the automobile with all the indicia of ownership,and no notice,constructive or otherwise, was ever given to thejudgment creditor of Douglas or to any other person who might have extended him credit. To all outward appearances he was the Owner of the automobile. In fact

the deposit agreement itself states that the initial payment or deposit made by Douglas was to be"applied against the purchase price". Attorneys for appellant also insist that the fact that the trust receipt required appellant to keep the car insured is strong evidence that the transaction was not a sale,but that the property remained in appellant. There is nothing in the record to show how appellant became the owner of the car or that the Weber Company was not the onwer of the car when the transaction was had with Douglas. If appellant was in fact the owner it could keep the car insured and Douglas would not have been concerned. It would have made no difference to him whether it was insured or not and he would not have been responsible for its loss except it occured through his own negligence. On the other hand if the transaction was in fact a sale and it was really the understanding between the parties that Douglas was liable for the balance of the purchase price of the car regardless of whether he sold it or not,then he was concerned that appellant should keep it insured.

In our opinion the proof in this case supported the findings and judgment of the court either upon the ground that the transaction was in fact a sale and the automobile therefore subject to the executions or if not in fact a sale,that under the doctrine laid down by the Supreme Court in Drain v. LaGrange State Bank,Supra,appellant is estopped from asserting its ownership of the automobile.

No propositions of law were submitted to the trial court and no motion made to find the issues for appellant,so the only question raised by the record is whether the proof supports the finding of the court. The judgment is therefore, for the reasons above stated,affirmed.

AFFIRMED.

not to be reported.

Term No. 67. Agenda No. 25.

IN THE

APPELLATE COURT OF ILLINOIS,

Fourth District.

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OCTOBER TERM, A.D. 1924.

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| J. K. JONES, APPELLANT. -vs- P. H. PALMER, APPELLEE. | Appeal from Circuit Court, Madison County. |

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OPINION by HIGBEE, P. J.,

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Appellant, claiming that appellee was indebted to him in the sum of two hundred sixty dollars as commissions due him for procuring certain loans, brought suit for said amount before a Justice of the Peace of Madison County. Upon appeal in the Circuit Court of said County a jury found the issue in favor of appellee and there was a judgment against appellant for costs. Appellant contends that the trial court erred in refusing his motion, entered at the close of all the evidence, for a directed verdict in his favor, and also that the verdict was not warrented by the evidence. On this appeal therefore only a question of fact is involved. As it appears from the proof, appellee on November 3, 1922 made a written application to appellant for a loan of $2600.00 for a term of 15 years, with interest at the rate of 6½ per cent per annum. The loan was to be secured by a first mortgage on a certain lot in Granite City, Illinois, upon which a dwelling house was to be erected.

On November 11, 1922, appellee made a similar application to appellant for a like amount to be secured by a first mortgage on another lot in said City. In each application it was stated that appellant's fee for his services in negtiating the loan was to be

5 per cent of the amount thereof. These loans were what are known as building loans and it was agreed by appellee in his application that the proceeds thereof should be deposited with appellant to be paid out by him to material men and contractors. Appellant claims that the applications were forwarded by him to the Chicago Trust Company of Chicago, Illinois, which company he expected to take the loans for acceptance and that on or about November 17, 1922 notes and mortgages covering the loans, were received by him at his office in Granite City from said institution; that he notified appellee several times on telephone of the receipt of said papers and that appellee promised each time he would come in and sign them but failed to do so. In his own behalf appellee claims and asserts that appellant in procuring loans was acting in connection with the First State and Savings Bank of Wood River, Illinois, and that all the money he handled came through this bank; that there had been difficulty theretofore on the part of those for whom he had previously secured loans to procure their money; that after appellant had obtained appellee's applications and before anything had been done to obtain the money or consumate the loan the First State and Savings Bank of Wood River, Illinois had failed; that on November 17,1922 the Bank had closed and a receiver was appointed for the same; that learning of these conditions appellee "about the time the bank went broke" notified appellant that he did not want the loan and proceeded to procure the money some other place.

Both of the applications signed by appellee contained, as appears from the record, under the heading, "Local Bank stamp here" the words "First State and Savings Bank, Wood River,Illinois." This would seem to support appellee's contention that the money for the loan was to go through that bank as the local representative of the Chicago Trust Company.

Appellants theory of the case was that he had furnished a party able, ready and willing to lend the money upon the terms provided for by the applications and that therefore he was entitled to his commission.

The theory of appellee on the trial was that he had cancelled his application for the loan before appellant had received the acceptance of the bank and tendered the notes and mortgages. Appellant and appellee were the only witneses sworn on the trial of the case. Appellant testified to facts tending to support his right to a recovery while appellee's testimony supported his theory that he had a right to cancel his applications, under the circumstances, and that he did so in apt time. Each witness sharply contradicted the other in important details relating to alleged conversations between them. It is admitted by appellant that he did not ask appellee to sign any note or mortgage before the failure of the local Wood River Bank, because he did not have the same before that time, and appellee testified that he never saw the notes and mortgages in question until they were produced on the trial.

The questions at issue were fairly submitted to the jury and under the condition of the proof as above indicated the Court properly refused to direct a verdict and we are not at liberty to disturb the verdict found by the jury. The judgment will be affirmed.

AFFIRMED.

Not to be reported.

Term No. 3. Agenda No.39.

IN THE

APPELLATE COURT OF ILLINOIS,

FOURTH DISTRICT.

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October Term, A.D. 1924.

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| The People of the State of Illinois, Defendant in Error. -vs- Claude Claunch, Plaintiff in Error. | Error to the County Court of Williamson County. |

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OPINION by Barry,J.

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In an information consisting of one count it was charged that plaintiff on February 17th,1923 did wilfully and unlawfully "manufacture, keep for sale and sell intoxicating liquor" without having a lawful permit from the Attorney General &c. A jury found him guilty and he was sentenced to the county jail for 6 months and fined $1000.00.

The record discloses that a search warrent was i sued to the sheriff in which it was recited that a complaint had been made by the State's Attorney, verified by his affidavit, stating that he had just and reasonable grounds to believe and does believe that intoxicating liquor is now unlawfully being made and sold at and within a certain dwelling house occupied by Claude Claunch, House No. 44.,in the village of Bush in said county. The writ directed the sheriff to search said house for intoxicating liquor and to seize all that might be found therein. The sheriff endorsed thereon the following return:- "Searched the within premises and found two gals. of illicit liquor."

Upon the trial the writ and return were admitted in

evidence over plaintiff's objection. Such evidence was incompetent and prejudicial, People vs. Fryer, 266 Ill. 216. The search was made by two deputy sheriffs who were the only witnesses in the case, Plaintiff offered no evidence. The officers testified that while one of them was reading the warrant to plaintiff the latters wife went to a another room and tried to close the door after her but the other officer prevented her fromdoing so and found that she had a two gallon jug; that there was a little tussle over the jug; that the officer who was reading the writ asked plaintiff to stop her from resisting the officer and that plaintiff asked her to stop.

One of the officers testified that he smelled the jug and tasted its contents. He was asked:- "From your knowledge and experience, tell the jury whether the contents of that jug was intoxicating?" and he answered, "Yes sir." The other officer testified that "she (plaintiff's wife) was trying to get away with the whiskey." There was no other evidence tending to prove the charges in the information. There was no evidence that plaintiff or his wife had manufactured intoxicating liquor, or that it was kept for sale or had been sold. There was no motion to quash the information for duplicity or to require the People to elect upon which charge they would prosecute. If it can be said that the charge that plaintiff kept intoxicating liquor for sale is equivalent to a charge of unlawful possession, we are of opinion the evidence is insufficient to support the charge. The officer who testified that he smelled the jug and tasted its contents and that from his knowledge and experience it was intoxicating liquor, did not testify that he had any previous knowledge or experience or that he could tell when liquor contained more than one-half of one per cent of alcohol by volume. He did not testify that the liquor was alcohol, brandy, whiskey, rum, gin, beer, ale, porter or wine. The other witness simply testified that the plaintiff's wife was trying to get away with the whiskey. He did not say that he had smelled or tasted it. He gave no reason for calling it whiskey.

No instructions were asked or given to the jury.

It is quite apparent that they must have attached great weight to the search warrant and sheriff's return thereon. Plaintiff has not had a fair and impartial trial. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

not to be reported.

Term No. 40. 236 I.A. 661 Agenda No. 48

IN THE

APPELLATE COURT OF ILLINOIS,

Fourth District.

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COTOBER TERM, A.D. 1924.

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| OSCAR C. VULBROCK, Appellant. | ) | Appeal from |
| vs. | ) | Circuit Court, |
| WILLIAM H. THARP, Appellee. | ) | Washington County |

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OPINION by Barry, J.

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Appellee operated a garage at Nashville, Ill. and appellant was in the same business at New Minden, Ill. In October 1918 appellee sold and delivered a Fordson tractor and plow to appellant who paid for the same a few days later. He made the purchase in order that he might resell, at a profit, when he found a buyer. In Aug. 1919 appellant sold and delivered the tractor and plow to a farmer named Harmening. It did not work satisfactorily, although on several occasions, appellee endavered to put it in good working order. Later in the fall or early winter of 1919 appellee took the tractor, but not the plow, to his garage and overhauled it. He says he did that at the request of Mr. Hermening but the latter says appellee took the tractor of his own motion. After it was overhauled Mr. Hermening refused to take it and it has remained in appellee's garage ever since. So far as the record discloses the plow remained in the actual possession of Mr. Hermening.

Appellant brought this suit in 1923 to recover the purchase price paid by him on the theory that appellee warranted

the tractor and plow, that there was a breach of the warranty and that he had elected to rescind the contract. The trial resulted in a verdict and judgment in favor of appellee.

In any event appellant was not entitled to recover for the alleged breach of an implied warranty. He averred in his declaration that appellee sold him a Fordson tractor and plow. When a specified article is sold under its patent or other trade name there is no implied warrenty as to its fitness for any purpose, Callaghans Ill. St. An. Ch. I2IA. par.I8, clause 4; Peoria Grape Sugar Co., vs. Turney, I75 Ill. 63I; Fuchs & Lang Co., vs. Kittridge & Co., 242 Ill. 88. The only complaint in regard to the instructions is that those given on behalf of appellee were on the theory that appellant must prove an express warrenty before he could recover. The criticism is not well founded under the foregoing authorities.

The evidence bearing on the question as to whether appellee made an express warrenty was conflicting and we are not warranted in holding that the verdict is manifestly against the weight thereof. Appellant did not seek to recover damages for a breach of warrenty but claimed he was entitled to recover what he had paid for the property because there was a warranty and a breach thereof and that he had rescinded the contract. He admits that he purchased a Fordson tractor and plow and that they were delivered to him. That being true he could not rescind the contract for a breach of warranty if he failed to notify appellee within a reasonable time of his election to recind, or if he failed to return or offer to return the property purchased, Callaghans Ill. St. An. ch. I2IA Par. 72, cl. 3.

Appellant testified that in the fall of 1919 when the tractor was not working properly he said to appellee:- "There is no use to keep this tractor; give us another one. I am willing to lose something on it because I can't sell any tractors with this thing around," and that appellee wouldn't listen to it. That is the nearest approach to a notice that he had elected to recind. It is true that appellee also testified that he heard Mr. Hermening tell appellee that he was not going to keep the tractor, that it caused him a lot of trouble etc., and that appellee replied that Hermening didn't have to keep it unless they made it do the work. Appellant testified that he sold the tractor and plow to Mr. Hermening under an express warranty; that appellee had nothing to do with the sale to Hermening; that when he purchased the machinery from appellee he simply bought it for resale in a general way and didn't have Hermening in mind as a prospective purchaser.

The evidence does not show that appellant notified appellee of his election to rescind the contract. He did not claim in his declaration that he had returned or offered to return the property to appellee. The only averment in that regard is that because of its defective condition appellee took the tractor from the possession of appellant to his garage and has retained the same. Appellant had sold and delivered the tractor and plow to Mr. Hermening who had possession of it when the tractor was taken to appellee's garage. There is no evidence that the contract between appellant and Hermening had been rescinded at that time. The latter was entitled to and had the actual possession of the tractor and it was not taken from the possession of appellant as averred in his declaration.

Appellant never returned or offered to return the tractor and plow to appellee. The plow was never returned to appellee by any one, nor did it come to his possession for any purpose. While the tractor came into and remained in appellee's possession it is quite clear that it was not because appellant had notified him of his election to rescind, nor because he had returned it or offered to return it. To excuse his failure to return, or offer to return the plow, appellant averred, in his declaration, that it was of no value to him except for use in connection with a Fordeon tractor. The averment was not proven, but if it had been it would not be sufficient. To excuse a failure to return it should be averred and proven that the plow was of no intrinsic value.

The rule of law is well settled that a party will not be permitted to affirm a contract in part and rescind as to the residue. He must put the opposite party in as good condition as he was before the sale by returning or offering to return the property purchased, unless it is entirely worthless, Wolf vs. Dietzsch, 75 Ill. 205; Bollow vs. Novacek, 184 Ill. 463; Maffer vs. Ginocchio, 299 Ill. 254-259.

Appellant failed to prove that he was entitled to recover the purchase price and made no claim for damages for a breach of warranty. As there is no error in the record the judgment is affirmed.

AFFIRMED.

Not to be reported.

Term No. 51. IN THE Agenda No. 51.

APPELLATE COURT OF ILLINOIS,

Fourth District.

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OCTOBER TERM A.D. 1924.

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OPINION by BARRY, J.

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| FRED MANN, Appellee. -vs- Christina Mann, Appellant. | Appeal from Corcuit Court, St.Clair County. |

On a trial before the court, without a jury, a decree of divorce was entered in favor of appellee on the ground of desertion. The marriage was a second venture for both parties and was contracted after they were 50 years of age. It is undisputed that appellant left the home more than two years before this suit was begun and that she never returned. The controversy is as to whether she had a reasonable cause for leaving. Each owned a home at the time they were married. Appellant contends that one of the considerations for the marriage contract was the promise of appellee that after they had lived in his home for some time he would then consent to move to her home. If we assume that this is a matter about which they could lawfully contract it would have to be evidenced by a written instrument under the Statute of Frauds.

Appellant insists that the court erred in the admission and exclusion of evidence. The complaints in that regard are not of a cerious nature and if well taken would not constitute reversible error if the case had been tried before a jury. It is agreed that the conduct of appellee was such as to show that he wanted her to leave. She testified that on various

occasions he ordered her to leave; that he cursed her and called her vile names and refused her money for various purposes; that he was high tempered and on one occasion jerked a shirt out of her hand and hurt her arm. Appellee denied all of those matters. Each had some corroborating evidence. Dr. Harrow treated appellant after the separation and testified that she told him the only thing she had against her husband was that he didn't keep his promise, made before they were married, that he would move into her house not later than six months after the marriage. She simply denied that she said it like that.

Appellant testified on direct examination as follows:- "I talked to him about moving on saturday. I asked him to come along if he wanted to. I told him I was going to move if I didn't get better treatment than this, that there was too much work for one woman alone." On cross-examination she said:- "I asked him because I was afraid, you know. I asked him to cool him off. I asked him and he refused. That is true. I left him because I couldn't stand it with him on account of his ill treatment. I asked him to go along, although he had mistreated me, because I was afraid he would do me harm."

There was a conflict in the evidence. The court saw and heard the witnesses and was in a better position to judge of the credibility and the weight to be given their testimony than we are from an examination of the cold record. We cannot say that a proper conclusion was not reached. The decree must be affirmed.

AFFIRMED.

Not to be reported.

236 I.A. 661

Term No. I. Agenda No.38

IN THE

APPELLATE COURT OF ILLINOIS,

FOURTH DISTRICT.

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OCTOBER TERM, A.D. 1924.

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| The People of the State of Illinois, Appellee. -vs- Will Hatcher, Appellant. | Appeal from the County Court of Williamson County. |

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OPINION by BOGGS, J.

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An information was filed by the states attorney of Williamson County, charging plaintiff in error Will Hatcher with a violation of the Illinois Prohibition Act. The information consists of one count, and charges that plaintiff in error "did willfully and unlawfully, by himself as principal and others as clerks and servants manufacture, keep for sale and sell intoxicating liquor within prohibition territory, without then and there having a lawful permit from the Attorney General of this State so to do, contrary to the statute," etc.

A motion was made by plaintiff in error to quash said information, which motion was overruled. A trial was had, resulting in a verdict of guilty. Motions for a new trial and in arrest of judgment were made by plaintiff in error and were overruled by the court, and judgment was entered, sentencing plaintiff in error to the county jail for sixty days and fining him $500.00 and costs, with an order that he stand committed until the fine and costs were paid. To reverse said judgment, this writ of error is prosecuted.

It is first contended for a reversal of said judgment

that the court erred in overruling the motion to quash the information and in arrest of judgment.

Three distinct violations of the Prohibition law were attempted to be charged in the information, viz: the manufacture, the keeping for sale and the selling of intoxicating liquors. The law is that it is not proper to charge in the same count of an indictment or information seperate and distinct violations of the law. Lequat vs. People, II, Ill. 330. We therefore hold that the trial court erred in overruling the motions to quash the information and in arrest of judgment. We are not otherwise passing on the sufficiency of the information, as we do not feel that we should do so without a more complete presentation of the questions involved.

It is next contended by plaintiff in error that the court erred in admitting in evidence the search warrent which had been issued for the searching of the premises of plaintiff in error. The search warrent in question, with the return thereon, was admitted in evidence over the objection of plaintiff in error. This ruling of the court was erroneous. People, v. Frayer, 266, Ill. 216; People, v. Bishop, 325, Ill. 610.

In People v. Frayer, supra, the court at page 220 says;

"The warrent and return were improperly introduced in evidence over the plaintiff in error's objection. These documents were not legal evidence of any fact in the case. It was competent to prove by the officers what they found and to identify by competent evidence the articles as those stolen. The warrent recites that the articles named in it were feloniously stolen, and the return, that the articles were those described in the writ. Neither statement was evidence against the plaintiff in error of its correctness, yet they were submitted to the jury as tending to prove the issues."

The return on the search warrent here in question is as follows: "I have duly executed the within search warrant by searching the within described premises and finding a quantity of beer.

this 14th, day of July, A.D. 1923." Signed "George Galligan, Sheriff."

It is next contended that a new trial should be granted for the reason that it is contended in plaintiff in error's argument that some three or four thousand persons appeared at the court house while said trial was in progress, and that inflammatory speeches were made in the hearing of the jury, which, it is contended, influenced the verdict. However, there is nothing in the record disclosing anything of this character. We cannot consider matters sought to be brought to our attention solely in the arguments of counsel.

Errors were also assigned on the ruling of the court on the instructions. These assignments of error were not referred to in plaintiff in error's brief and argument, and are therefore under our rules taken as abandoned. Other errors were assigned on the record, but in view of our holding on the sufficiency of the information it is not necessary to discuss the same.

No brief was filed by the state's attorney, and under the rules of this court said judgment could be reversed pro forma. However, this being the People's case, we are passing on the merits of the same.

For the reasons above set forth, the judgment will be reversed, and remanded.

Judgment Reversed and Remanded.

Not to be reported.

236 I.A. 661

Term No. 20. Agenda No. 29.

IN THE

APPELLATE COURT OF ILLINOIS,

Fourth District.

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OCTOBER TERM, A.D. 1924.

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| LAURA SMITH, Administratrix, etc., Plaintiff in Error. -vs- CHICAGO BURLINGTON & QUINCY R.R.CO., Defendant in Error. | Error to the Madison County Circuit Court. |

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OPINION by Boggs, J.

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An action on the case was instituted in the circuit court of Madison County by plaintiff in error, hereinafter called plaintiff, against defendant in error, hereinafter called defendant, to recover for the death of plaintiff's intestate, who was struck and killed by one of defendant's trains.

The declaration consists of but one count, and charges defendant with having carelessly and negligently run its train at a speed of twenty-five miles per hour through the village of Wood River, in violation of an ordinance of said village limiting the speed of passenger trains therein to ten miles per hour. To said declaration defendant filed a plea of the general issue. A trial was had, resulting in a verdict and judgment in favor of defendant. To reverse said judgment, this writ of error is prosecuted.

The record discloses that the tracks of the Big Four, C. & A., and the Alton, Granite & StLouis Traction Co., run in a northerly and southerly direction through said village, crossing Ferguson Avenue at right angles. The Big Four is the most east-

erly of said tracks. Adjoining it on the west is the C. & A. track and right of way, and adjoining the C. & A. right of way on the west is thetrack and right of way of the Alton, Granite & St.Louis Traction Co. All north-bound trains of the Big Four, C. & A., and the Burlington, run over the Big Four Track, and all south-bound trains of said companies run over the C. & A., being the westerly track. Immediately west and adjoining the Big Four track, and north of and adjoining Ferguson Avenue, is a cinder platform, which constitute/the only station of the Big Four Railroad at said place. Immediately west of and adjoining the C. & A. track is a similar platform or station.

On the morning in question, plaintiff's intestate, who was engaged in carrying the mail between the postoffice at Wood River and certain of the trains passing through said village, had placed several sacks of mail on the cinder platform at the side of the Big Four track, for a northbound C. & A. train. He thereafter unloaded certain sacks of mail for a south-bound train on the other of said cinder platforms. The south-bound train of the C. & A. was due at 9:17, and the north-bound at 9:18. While plaintiff's intestate was engaged with the south-bound mail, the train in question whistled into Wood River from the south, running some eight or ten minutes late. Plaintiff's intestate hastened over to the mail sacks left by the north-bound track. He had a cart with him, which he was attempting to back over the mail sacks laying on the platform, and in doing so he stepped back over the track, far enough to be struck by the defendant's train, and was killed.

The only errors complained of and discussed by counsel for the plaintiff in his brief and argument, are the rulings of the trial court on the instructions.

It is first insisted that the court erred in refusing an instruction on the measure of damages, offered by plaintiff.

discloses that the track was perfectly straight for at least a mile south of the point of the accident, and there was nothing in the way to obstruct the view of one standing by the mail bags from seeing the approaching train. The evidence further discloses that a flagman was standing on Ferguson Avenue holding up a stop sign as said train wasapproaching. The deceased passed within four or five feet of this flagman, who called his attention to the approaching train, and the deceased replied, "I know it." The evidence therefore sustained the verdict of the jury.

It is next contended by plaintiff that the court erred in giving the eighth instruction on behalf of the defendant, said instruction being as follows:

"The court instructs the jury that the more dangerous a place is the more care and caution is required of one approaching or working in the vicinity of same, and the court instructs the jury that one approaching or working about or near a railroad track is required by law to exercise care in proportion to the apparent danger of such a place."

This instruction states a correct principle of law, but we do not wholly approve of the form in which the same is stated. However, the giving of the same, on this record, was not error. Austen, Admx., v. C. R. I. & P. R. Co., 9I Ill. 35-38; Wilson v. I. C. R. Co., 2I0 Ill. 603-607; Loettker v. Chi. City R. Co., I00 Ill. App. 69-74.

It is a well settled principle of law that contributory negligence on the part of a plaintiff will bar his right to recover, notwithstanding the defendant may have been guilty of the negligence charged in the declaration, where that negligence is n not wanton and willful. Wilson v. I. C. R. Co., supra; Belt Ry.

The only observation made in connection with the first instruction is that it is "at least inaccurate, and was misleading to the jury." It is not pointed out in what way this instruction is inaccurate, or in what way it would tend to mislead the jury. So far as we can observe from reading the instruction, there is nothing in it that would warrant us in reversing said judgment.

The second instruction told the jury that the allegation of due care must be proved without reference to the speed of the train. The only criticism of this instruction is that it "is too strong; care may be inferred from the circumstances in a case." This instruction may not be as carefully guarded as it should be, but on the whole we think it states a correct principle of law, and the court did not err in giving the same.

The sixth instruction is to the effect that if the jury believed that the deceased knew or with the exercise of reasonable care should have known that a train was approaching, and that he carelessly and negligently came too near or backed into said train and was thereby struck and killed, no recovery could be had. This instruction states a correct principle of law.

The seventh instruction is to the effect that the mere fact that the deceased was killed by being struck by defendant's train, is not in and of itself any evidence of negligence on the part of the defendant. We do not approve of this instruction, for if the defendant was operating its train in violation of said ordinance, we are not prepaired to say that it was not, in and of itself, evidence tending to show negligence. However, on the record in this case, we hold that the giving of said instruction was not reversible error, as the evidence wholly fails to show in any affirmative way that plaintiff's intestate was in the exercise of due care for his own safety, just prior to and at the time of the accident.

In this connection it may be observed that the record

This instruction is the only instruction setb ont in the abstract as having been tendered by plaintiff. It is numbered 4, and we therefore assume that there were three other instruments offered on her behalf.

The Supreme Court has frequently held that error in giving or refusing instructions will be considered on appeal or writ of error, only when all of the instructions given are set out in full in the abstract. Thompson v. People, 192 Ill.79, citing and approving Pratt & Co. v. Paris Gas Light Co.,155 Ill. 531; City of Roodhouse v. Christian, 158 Ill. 137; City Electric Ry.Co. v. Jones, 161 Ill. 47; Gibler v. City of Mattoon, 167 Ill. 18; Straude v. Shumacher, 187 Ill. 187. To the same effect is Siegel, Cooper & Co. v. Morton, 209 Ill. 201; Reavely v. Harris, 239 Ill. 526-531. We would therefore, under the holding of these authorities, be warranted in not considering this assignment of error. However,it may be observed that inasmuch as thefinding in this case was for the defendant, it was immaterial whether or not the court gave any instructions on the measure of damages. Clause v. Bullock, 118 Ill. 612; Cotton v. Dexter, 70 Ill. App. 586. Then too, the court gave an instruction on behalf of the defendant, which correctly stated the measure of damages that should govern if the jury found for the plaintiff, so in any view of the case, we would not be warranted in reversing said judgment for the refusal to give the instruction in question.

It is next contended that the court erred in giving the first, second, sixth, seventh and eighth instructions given on behalf of the defendant. What we have already said with referance to the failure of the plaintiff to abstract the instructions would also apply to this assignment of error, as the only instructions set out in the abstract as given on behalf of the defendant are the five complained of. Notwithstanding the failure of the plaintiff to properly abstract the instructions, we are considering the same on the merits.

[illegible]

Co. of Chicago v. Skyszypezak, 225 Ill. 242-245; C. & W. I. R. Co. v. Reichert, 69 Ill.App. 91-93.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

Not to be reported.

Term No. 35. **236 I.A. 661** Agenda No. 20

IN THE

APPELLATE COURT OF ILLINOIS,

Fourth District.

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OCTOBER TERM, A.D. 1924.

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| GEORGE SCHNEIDER, Appellee. -vs- WABASH RAILROAD COMPANY, Appellant. | Appeal from Circuit Court, Madison County |

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OPINION by Boggs, J.

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Appellant, Wabash Railroad Company, prosecutes this appeal to reverse a judgment for $1,250.00 rendered against it for damages resulting to a truck loaded with flour belonging to appellee in a crossing accident on Broadway in the city of Venice.

Broadway is the main thoroughfare through Venice, and runs in an easterly and westerly direction. Near its westerly end it is crossed by four sets of railroad tracks, appellant's track being the most easterly of the group. These tracks extend in a northerly and southerly direction, and intersect Broadway at an angle of about 62' between the east side of said tracks and the north side of Broadway. Said crossing is protected by four crossing gates, two being east of said railroad tracks, and two on the west side thereof. Said gates are raised and lowered by electric power, operated from a tower immediately west of appellant's track and on the north side of Broadway. There is also a gong or bell on the south side of said tower-house, which is also operated from the tower. When trains are approaching the crossing, the towerman usually sounds the gong as a warning or danger signal, and then

lowers thegates so as to block traffic. The south side of Broadway east of said railroad tracks is closely built up by business houses and public buildings. The city hall, being the most westerly of said buildings. extends to within about twenty feet of appellant's track. On the north side of Broadway there is very little obstruction to the view of a person traveling west, after he reaches a point within I25 feet of appellant's track.

On September 4th, I923, one Clyde Shashek, the driver of said truck, was proceeding west along Broadway, and while attempting to cross appellant's track, the rear end of said truck was struck by one of appellant's passenger trains, coming from the north, the flour on said truck was scattered, the body of the

truck was torn from the chassis, and the truck was otherwise damaged. To recover therefor , appellee instituted this suit in the Circuit Court of Madison County.

The declaration consists of four counts. The first count charges general negligence in the operation of appellants train, the second count charges the operation of said train at a high rate of speed, in violation of an ordinance of the city of Venice limiting the speed of passenger trains through said city to ten miles per hour. The third count charges that there is practically a continuous stream of traffic along Broadway over said railroad crossing; that appellant had erected and was maintaining certain crossing gates so as to give notice to the public of the approach of its trains; that the same had been maintained for such a length of time that the public relied thereon, and that appellant through its servants, negligently drove said passenger train at a high rate of speed toward and over said crossing "while the said crossing gates were up, as an invitation to the public to cross over the crossing, and with-

out having lowered the said gates as an indication and warning that a train was approaching." The fourth count, in addition to setting forth the maintenance of said crossing gates, alleges that appellant had installed a crossing bell or gong to give warning to the public when a train was approaching; that on the day in question appellant negligently drove the said train at a high and excessive rate of speed over said crossing, without having lowered said gates or without having caused said crossing bell to be rung, etc. Each of said counts alleges due care on the part of the driver of appellee's truck. A plea of the general issue was filed, and a trial was had, resulting in a verdict and judgment in favor of appellee as above set forth.

While numerous errors were assigned on the record, the only error relied on and argued in appellant's brief are: First, that appellee's driver was guilty of contributory negligence. Second, that the verdict and judgment are against the manifest weight of the evidence. Third, that the court erred in its rulings on the evidence.

The driver of appellee's truck was accompanied by one George Bergdorff, a young man of about seventeen years of age. Both the driver and Bergdorff testified that as they approached said crossing, they looked to the right and could see as far as the Merchants Bridge, being something over 2100 feet, and that they saw no train approaching at that time; that they then looked to the left, and back again to the right, when they saw the train in question. They further testified that at that time it was within about fifty feet of them, and was running from twenty-five to thirty miles per hour; that it was impossible to stop the truck, and that the engine was speeded up in an effort to clear said track, when the rear end of the body of the truck was struck as above stated. In addition to this testimony, the driver of the truck tes

tified that when he first looked to the right, he slowed up the truck . Both of said witnesses, together with other witnesses who saw the accident, testified that the gates were not lowered, and that they heard no bell rung or whistle blown on said engine. One of the witnesses on the part of appellee testified that when the train was stopped, the bell was ringing. Another of said witnesses stated that he was in a Ford coupe; that his engine was making considerable noise, and that a whistle might have been blown or a bell rung without his hearing it.

On the other hand, the witnesses on the part of appellant testified to the effect that said train at the time it crossed Broadway was running from ten to fifteen miles per hour. All of the witnesses but one who testified as to the speed of said train as it crossed Broadway, testified that it was running from about twelve to fifteen miles per hour; the one witness testifie d it was running from ten to twelve miles per hour. However, it is practically conceded by counsel for appellant that the evidence is to the effect that at the time said engine crossed Broadway, it was running in excess of ten miles per hour. The engineer and fireman, and the man who operated said gates, all testified that the regular crossing whistles were blown and the bell was rung on said engine, and the towerman testified that the crossing gong was sounded. The conductor on the train testified that he gave no attention to the signals, and the brakeman did not testify in referance thereto. There is no contention on the part of counsel for appellant that the crossing gates were lowered.

E.E.Shively, the fireman on the engine in question, testified that said engine was running about twelve miles per hour at the time in question. However, a referance to his testimony wiould indicate that he was mistaken in referance thereto, his testimony being as follows: "I watched the truck approach the

crossing. It was running about ten miles an hour, and continued to do so until it went on the crossing....The truck was about I25 feet from the crossing when I first saw it come out from behind the car barn. We were then about 600 or 700 feet from the crossing ..I was watching the truck. There are some little shacks after you pass the car barn, close to the barn, and between it and the track, which obstruct your view to some extent. We had run from the distance of 600 to 700 feet north of the crossing to within 50 feet of the crossing while the truck ran from behind the car barn to the point opposite the gates." According to his testimony, said engine traveled between 600 and 700 feet while the truck traveled I25 feet, going at the rate of ten miles an hour. If he was correct as to the speed of the truck and as to the distance the engine traveled while the truck traveled I25 feet, this would indicate that appellant's train must have been going between forty and fifty miles an hour at said time. The watchman also testified on behalf of appellant that the truck as it approached the crossing was running about ten miles an hour. The evidence on the part of appellee's witnesses is to the effect that the truck was running from six to ten miles per hour as it approached said crossing.

The clear preponderance of the evidence is to the effect that said train was running at a speed greatly in excess of the speed designated in said ordinance. The driver of said truck had a right to assume that appellant would not violate the ordinance of said city by operating its trains through the same and over said crossing at a speed in excess of ten miles per hour, and this fact is to be taken into consideration in determining whether or not the driver of said truck, just prior to and at the time of the accident, was in the exercise of due care for his own safety and for the safety of said truck. C.& A.R.Co. v. Redmon, I7I Ill. 347; C. & A.R.Co. v. Bland, I75 Ill. I83; Dukeman v. C.C.C. & St.L.R.Co.

237 Ill. 104; C & A. R. Co. v. Wright, 120 Ill.App. 218; Carlin v. Grand Trunk Ry.Co.,150 Ill. App. 121; Hawes v. Hines,219 Ill. App. 524-529; Crawford v. C& A. R. Co.,226 Ill. App. 138.

Ordinarily, the question of contributory negligence is a question of fact for the jury, to be determined from the evidence, facts and circumstances appearing on the trial. Dukeman v. C.C.C. & St.L. R.Co.,237 Ill. 104; Chi.City R. Co. v. Nelson, 215 Ill. 436; Osborn v. City of Mt.Vernon, 197 Ill. App. 367; Crawford v. C.& A. R. Co., 226 Ill. App. 138-140.

By stationing a flagman at a crossing and making it his duty to display proper signals of warning whenever an engine or train is approaching, the public has a right to rely upon the absence of signals of warning and presume that the tracks are clear. C. M. & St.P. R. Co. v. Wilson, 133 Ill. 55; C. St. L. & P. R. Co. v. Hutchison, 120 Ill. 587; Crawford v. C & A. R, Co. , 226 Ill. App. 138-142.

In the case of C. St.L. & P.R. Co. v. Hutchison, supra, the court at page 592 in discussing this question says: "We are aware of expressions by this court when passing upon the law and fact, and of like expressions by other courts of the highest respectability, that the failure of one approaching a railroad crossing to pause and look for the approach of trains, was such negligence as would, in the case then under consideration, preclude a recovery. But we are not prepared to say, as a matter of law,,that a person approaching a railroad crossing, where there is nothing apparent to warn of danger, and at which he knows a flagman is stationed, whose known duty it is to warn all persons of danger from running trains, is required to look elsewhere than to the flagman. The flagman's duty is to know of the approach of trains, and to give timely warning to all persons attempting to cross the railroad track, and the public have a right to rely

upon a reasonable performance of that duty.

"It is the settled doctrine of this court, that to authorize a recovery for injuries resulting from the negligence of a defendant, it is only necessary that the plaintiff should have observed ordinary care for his personal safety, and to prevent the injury. (Illinois Central Railroad Co. v. Shultz, 64 Ill. 177; Illinois Central Railroad Co. v. Godfrey, 71 id. 507; Calumet Iron and Steel Co. v. Martin, 115 id. 359; Chicago and Eastern Illinois Railroad Co. v. O'Conner, 119 id. 586.) It may be, that in the particular case a reasonably prudent and careful man would more than observe the absence of the ordinary signal by the flagman; but if so, the facts and circumstances should be submitted to the jury, to be considered by them in determining whether the party had, under all the circumstances, exercised ordinary care and caution to prevent injury."

The law further is that the operation of a train at a high rate of speed within the corporate limits of a populous city is negligence, regardless of an ordinance limiting the rate of speed. C.C.C. St. L. R. Co. v. Baddely, 150 Ill. 328.

The evidence in this case is to the effect that Broadway was one of the busiest thoroughfares in said city, and that the point where the accident occured was one of the busiest on that street, so that this case is peculiarly applicable to the facts disclosed by this record. We therefore hold, in view of all the evidence, facts and circumstances appearing on the trial, that the jury were warranted in finding that the driver of said truck, just prior to and at the time of the injury, was in the exercise of due care for his own safety and for the safety of said truck.

It is next contended that the verdict of the jury is against the manifest weight of the evidence. That we have already

said, and the authorities we have cited, are sufficient to dispose of this assignment of error. The evidence in the record fully warranted the jury in finding the verdict they did, and we are not disposed to disturb the same as being against the manifest weight of the evidence.

Lastly, it is contended that the court erred in refusing to permit the station agent of appellant at Venice to testify that appellee, some hour or so after the accident in question, stated "that it looked to him like a piece of carelessness on the part of the driver." Appellee was not present at the time of the accident, and the fact that it was only the expression of an opinion on his part would seem to solve the question and show that the ruling of the court in refusing to admit said testimony, was correct. This holding, we think, is supported by the supreme court in C. & N. W. R. Co. v. Boone County, 44 Ill. 240; Chi. City R. Co. v. Lowitz, 218 Ill. 24-30.

No instructions were tendered or given on the part of appellee. Fifteen instructions were given on behalf of appellant which fully stated the law applicable to the case, and were as favorable to appellant as the law would warrant. There being no contention that the verdict was excessive, we are of the opinion and hold that there is no reversible error in the record, and that the judgment of the trial court should be affirmed.

JUDGMENT AFFIRMED.

Not to be reported.

said, and the authorities [illegible] to dis-
pose of this assignment [illegible]
[illegible] the [illegible] finding the [illegible]
not disposed to disturb the same as being [illegible] that the [illegible]
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[illegible] contended that the source [illegible]
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TERM NO.41. 236 I.A. 662 AG.NO.47.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

Appellants attys Wilmon Smith & Adelstein
Appellee attys O.H. Johnson & E.A. McNeill
from J. McFall Trial Judge

OCTOBER TERM , A. D. 1924.

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|---|---|
| J.A.BAUER, Appellee. vs CHICAGO BURLINGTON& QUINCY RAILROAD COMPANY. Appellant. | Appeal from the Circuit Court of Clinton County. |

OPINION BY BOGGS, J.

An action on the case was instituted by appellee in the Circuit Court of Clinton County to recover damages for injuries sustained by him as the results of a collision between his automobile and a train belonging to appellant.

The declaration originally consisted of four counts. The first count charged general negligence in the operation of the train. The second count charged failure to give the statutory signals. The third count alleged a violation of the speed ordinance of the city of Breese, limiting the speed of trains to ten miles per hour. The fourth count charged the negligent operation of appellant's train at a high and dangerous rate of speed without giving any signals or warnings. Before the cause was submitted to the jury, the first count was withdrawn, leaving the second, third and fourth counts. A plea of the general issue was filed by appellant, together with a special plea denying the ownership and control of the instrumentality alleged to have

caused the injury. A trial was had,resulting in a judgment in favor of appellee for ten thousand dollars. To reverse said judgment,this appeal is prosecuted.

The accident in question occured on July 9th, 1923,in the city of Breese,at the crossing of Cherry Street over the tracks of the Baltimore & Ohio Railroad Company. Cherry Street runs north and south,and crosses the B.& O. tracks,consisting of a main and a passing track,practically at right angles. The side or passing track is south of the main track,and just south of and adjacent to the right of way of the B. & O. Railroad is an east and west Street,known as South Broadway.

On the morning in question,appellee in company with his son,Erwin Bauer,who was then about seventeen years of age,was driving an automobile. They passed over the intersection of South Broadway and Cherry Street,and continued north on Cherry Street up to said railroad tracks,and as they were attempting to cross over the main track,the automobile in whch they were riding was struck by an east bound train of appellant. Appellee's son,who was driving said automobile,was killed,and appellee was seriously and permanently injured,his left arm,some eight or ten ribs, and certain of the vertabrae,were fractured,and his chest was crushed and injured.

It is first contended by counsel for appellant for a reversal of said jugment,that the court erred in denying the motion made by appellant at the close of appellee's evidence,and again at the close of all the evidence,to exclude the evidence and to direct a verdict in its favor.

All that is necessary for us to determine on this assignment of error is as to whether,taking the testimony of appellee's witnesses as true,together with the inferences

reasonably to be drawn therefrom, it fairly tends to prove appellee's cause of action. If it does, the court did not err in refusing to direct a verdict in favor of appellant. Blair v. I. C. R. Co., 243 Ill. 224-229; Moon v. A. E. & C. R. Co., 246 Ill 56-58.

Without going into a detailed consideration of the testimony of appellee's witnesses, it is only necessary to say that it tends to show that on the day in question a switch engine with some three of four cars attached thereto, was on the side or passing track, beginning some seventy feet west of Cherry Street. There was also some evidence tending to show that there were other cars on said passing track, coming down near to Cherry Street. Appellee testified that just before driving on to the passing track, the automobile was stopped, and that he looked both east and west along said track, and that he saw no train approaching. His view to the east, it is conceded, was unobstructed. He further testified that he directed his son to proceed, and that he again looked in each direction along said track, and that shortly after the car was started he stood up in the car and saw the smokestack of appellant's approaching engine, extending above certain cars on the passing track; that he exclaimed to his son, "For Heaven's sake, stop the car," and that immediately the automobile was struck by said engine. There was also testimony tending to prove that the statutory signals were not given, which would be competent evidence to be considered on the question of the due care of appellee at the time in question. This being the state of the record, the court did not err in refusing to direct a verdict.

It is next contended b appellant that the court erred in admitting in evidence the ordinance of the city of Breese, above referred to, on the ground that under the con-

ditions exsisting in said city and at said crossing, it was unreasonable. This objection was not made when the ordinance was offered on the trial of the cause, and appellant is therefore not in a very good situation to urge it here for the first time. However the Supreme Court in Soucie v. Payne, 299 Ill. 552, in discussing a similar question at page 557, says:

"It has been frequently decided by this court that cities and villages have the right to limit the speed of passenger trains by ordinance to ten miles per hour in accordance with the provisions of the statute of this state, and that such a right is a well recognized police power of such municipality. In the case of C. & A. R. Co., v. City of Carlinville, 200 Ill. 314, this court held that before a court can hold such an ordinance invalid, the want of the necessity for the same for the public safety must be clearly made to appear."

The showing of a want of necessity was not made to appear in the record in this case. The court did not err in admitting said ordinance in evidence.

It is next contended by appellant that there is no evidence in the record fairly tending to sustain the count based on the alleged failure of appellant to give the statutory signals.

Some five or six witnesses on behalf of appellee testified that at the time in question they heard no noises from the train. One or two of them testified that they failed to hear any bell rung or whistle blown. On the other hand, as great a number of witnesses testified on behalf of appellant that the statutory signals were given at the time in question. It is the contention of appellant, however, that the testimony on the part of appellant's witnesses in this connect-

ion was positive testimony,while the testimony on the part of appellee's witnesses was negative. While this,in effect, is true,at the same time it was for the jury to give such weight and credit to the testimony of the several witnesses as in their jugment and experience the same was entitled to under the facts and circumstances proved on the trial. This being true,we are not prepared to hold that the court erred in refusing to direct a verdict as to said count.

It is next contended by appellant that the speed of appellant's train was not the proximate cause of the injury. It is conceded by appellant that its train was exceeding the speed limit fixed by said ordinance. Practically all of the witnesses who testified in reference to the speed of the train testified that it was going from thirty-five to forty miles an hour as it passed over the crossing in question. Counsel for appellant,however,contend,that contributory negligence on the part of appellee,or the fact that the B.& O. Railroad switching crew allowed said engine and the three or four cars attached thereto,to stand on said side or passing track at a point which caused the view of appellee to be obstructed at the time of the accident,or both,constituted the proximate cause of the injury. Counsel for appellant argue at some length that the real or proximate cause of said injury,under the authorities,was the negligence of the B. & O. Railroad,and that appellant railroad was not responsible therefor.

The law is that if an injury results from the negligent act of another,it is no defense that the negligence of a third person,or an inevitable accident,or some inanimate thing,also contributed to the cause of the injury,if the negligence charged against the wrong doer was an effecient cause and without which the injury would not have

occured. City of Joliet v. Feldt, 144 Ill. 403;Miller v. Kelly Coal Co., 239 Ill. 626; Brunnworth v. Kerens Coal Co., 260 Ill. 202-210. The rule laid down by the Supreme Court in the foregoing cases clearly establishes that the point sought to be made in this connection by appellant is not well taken, as the evidence clearly tends to show that the speed of appellant's train was at least an efficient cause of the injury. The law further is that it is for the jury to say on conflicting testimony as to what constitues the proximate cause of an injury. C. & E. I. R. R. Co., v Mochell, 193 Ill. 208;Armour v. Golkowska , 202 Ill. 144; Waschow v. Kelly Coal Co., 245 Ill. 516.

We have already discussed the question of contributory negligence on the part of appellee,and have held that it was a question for the jury.

It is next contended by appellant that the court erred in giving the three instructions given on part of appellee,and in refusing to give the refused instructions offered by appellant.

As to the first and second of appellee's given instructions,it is contended that the court erred in assuming that the train in question was the train of appellant company. The evidence,both on the part of appellee and on the part of appellant's witnesses,so clearly proved the ownership of said train in appellant company that the court was warranted in assuming such ownership in giving said instructions. There was no evidence to the contrary.

The objection most strenuously urged against all three of the instructions given on behalf of appellee is that the court did not limit the jury in detirmining the amount of appellee's damages,if any,to the negligence charged in the declaration.

The court did not err in giving these instructions,for the reason urged. Illinois Terminal R.Co., v.Thompson,210 Ill. 226 - 239; Bonato v. Peabody Coal Co.,248 Ill.422,and cases there cited. Brunnworth v. Kerens Coal Co., 260 Ill. 202 - 219. In the latter case the court says:

"It is further insisted by plaintiff in error that two of the instructions given on behalf of defendant in error were misleading,in that they failed to tell the jury what the pecuniary loss to the defendant rested upon,and did not limit it to the allegations of the declaration. The instructions in question on this point were substantially the same as instructions which have been heretofore sustained by this court." And in Illinois Terminal R.Co. v. Thompson,supra,the court at page 239 says:

"If the instruction had permitted the jury to allow such damages as they believed the appellee was entitled to without reference to the amount of damages which appellee had sustained,and without relying upon the evidence to determine the amount of the damages,it would have been incorrect".

Other objections were urged to these instructions, but we do not deem them of sufficient importance to discuss them in this opinion. There was no error in the giving of the three instructions given on behalf of appellee.

Thirteen instructions were given on behalf of appellant. An examination of these instructions discloses that the court fully instructed the jury touching appellant's theory of the case,so far as the same was properly disclosed by the record. Several of the instructions offered on behalf of appellant which were refused by the court were in abstract form and for that reason the court did

not err in refusing to give the same. The other instructiions offered by appellant and which the court refused,so far as the same stated correct principals of law,were covered by the given instructions. The court did not err in its rulings on the instructions.

It is next contended by appellant that the court erred in refusing to grant a new trial on account of language used by counsel for appellee in his argument to the jury, the language objected to being"put yourselves in Dr.Bauer's place." Objection was made to this statement by counsel for appellant,and the court sustained the objection and directed the jury to disregard the statement. This being the state of the record,the court did not err in refusing to grant a new trial on account of said remark,especially in view of the fact that no complaint is made by appellant as to the amount of the verdict.

It is next contended by appellant that the court erred in refusing to grant a new trial on account of the fact that during a recess,a stereopticon instrument was brought into court by one of the physicians,and its use in examining or reading X-ray plates was demonstrated to the court reporter. Upon objection being made by counsel for appellant to the instrument being brought into court or being used,the jury were excluded,and the court held that in view of the fact that the doctor or operator of the X-ray machine had already read the X-ray photographs to the jury, that there was no occasion for using the instrument, the same was removed from the courtroom. So far as the record discloses,nothing of a preju-dicial character occured in connection with said instrument,such as to warrant the granting of a new trial. So far as the record discloses,the jury did not see said instrument operated,or even if they had,

there is nothing to show that any prejudice resulted to appellant therefrom.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

Not to be reported.

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